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Recommendations and Reports

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Volume I

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies of legislative changes.

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RECOMMENDATIONS
AND
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RECOMMENDATION 87-1:

PRIORITY SETTING AND MANAGEMENT OF RULEMAKING BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

The Administrative Conference has undertaken a study of the rulemaking process at the Occupational Safety and Health Administration. It is recognized that OSHA's mandate to regulate any substance or hazard that poses a significant risk to workers and, to the extent feasible, make every workplace safe is daunting, and that alternative approaches to substance-by-substance regulation may be necessary. The Conference plans to address this larger issue in its continuing study. In this recommendation, the Conference suggests procedures that OSHA can institute administratively to improve two aspects of its current process for developing health and safety standards.

In Part 1, the Conference recommends to OSHA a procedure for systematically setting long-term priorities for promulgating standards for regulating health and safety hazards. Once established, the recommended regulatory priorities lists will serve as a baseline against which additions or modifications of the lists can be considered. The task of developing the priority lists would be assigned to a permanent, internal agency committee, with additional representation from the National Institute for Occupational Safety and Health (NIOSH). The committee would work closely with other health and environmental agencies in developing initial priority lists which would be submitted for decision to the Assistant Secretary for Occupational Safety and Health, Department of Labor.[1]

Although these regulatory priorities lists should generally govern when OSHA initiates rulemaking, the Conference does not intend that this priority-setting process should in any way diminish the Assistant Secretary's authority to promulgate rules on an expedited basis under the Occupational Safety and Health Act or the Administrative Procedure Act. Moreover, the recommendation (in paragraph 1.d.) takes account of the need for an expedited priority decision process in certain situations, such as referral by the Environmental Protection Agency of rulemaking topics under the Toxic Substances Control Act or the filing of rulemaking petitions.

The Conference believes that the procedures suggested in Part 1 would be infeasible if OSHA's regulatory priority rankings could be challenged in suits for judicial review. Therefore, the Conference urges that the regulatory priorities lists not be treated as rules for which judicial review would be appropriate.[2] Nonetheless, public participation is desirable, and the Conference sets forth specific steps OSHA should take to involve the public in its priority-setting process.

Part 2 of the recommendation suggests procedures for OSHA's management of rulemaking. The Conference's study revealed the need for systematic monitoring of the progress of individual rulemakings and for greater coordination at the staff and policy levels. Thus, the recommendation suggests that OSHA adopt a computer-based tracking system, a team approach to rulemaking, and an options review process to involve high-level agency policymaking officials in designated major rulemakings.

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[1] In 1982 the Conference addressed the importance of interagency cooperation in identifying and ranking potentially cancer-causing chemicals for regulation and recognized the important role played by the National Toxicology Program in fostering such cooperation, *see* ACUS Recommendation 82-5, Federal Regulation of Cancer-Causing Chemicals, Part II, 1 CFR § 305.82-5.

[2] The tentative nature of agency rankings and the need for flexibility were previously recognized by the Conference in considering priority-setting for the regulation of cancer-causing chemicals. *See* ACUS Recommendation 82-5, *id.*, Part I, ¶5.

The Conference does not intend either the priority-setting or management procedures in this recommendation to affect OSHA's compliance with any other procedural requirements to which it is subject pursuant to statute or executive order.

RECOMMENDATION

1. Setting of Priorities for Rulemaking. This part recommends procedures that the Occupational Safety and Health Administration should follow in establishing priorities for promulgating standards for regulating health and safety hazards.

a. *Regulatory Priorities Committee.* OSHA should establish a permanent committee charged with developing regulatory priorities which, once they are approved by the Assistant Secretary for Occupational Safety and Health, Department of Labor, will presumptively apply when the agency undertakes rulemaking to establish health and safety standards.

(1) This committee should include high-level management officials and experienced professionals from OSHA and a representative from the National Institute for Occupational Safety and Health (NIOSH). To provide continuity, committee members should be appointed for staggered terms and be eligible for reappointment. The committee should otherwise be no larger than necessary to discharge its duties.

(2) OSHA should provide adequate staff support for the committee and additional resources as necessary to enable it to gather information on potential rulemaking topics and, where appropriate, to perform risk assessments and priority-setting.

(3) The committee should establish initial priority lists for health and safety regulation and, thereafter, meet regularly to consider additions, deletions or revisions of the lists and to conduct periodic reviews.

(i) In developing an *initial* priority list, the committee should use existing information, including risk assessments and other technical and policy considerations. The committee should avoid elaborate risk assessments or weighting systems, and it should not incorporate by reference lists prepared by other agencies for other purposes.

(ii) It may be appropriate, however, for the committee to utilize more sophisticated risk assessments or weighting systems when it conducts a periodic review of, or considers modifications to, a priority list.

(4) OSHA should work closely with NIOSH, other relevant health and environmental agencies, and the National Toxicology Program in developing its initial priority lists and in revising these lists. In addition, OSHA and NIOSH should establish procedures that will permit rapid exchanges of information on projects that OSHA assigns to the expedited decision process (*see* paragraph d. below).

b. *Judicial Review*. The Assistant Secretary's decision to place a topic on a regulatory priorities list, the ranking of a topic on a list, and subsequent modification of a topic's priority on a list should not be treated as rules for which judicial review would be appropriate. However, the Assistant Secretary should allow public participation in the priority-setting process (in accordance with paragraph c. below) and provide an explanation of priority decisions.

c. *Public Participation*. OSHA should take the following steps to involve the public in its regulatory priority-setting process:

(1) Before establishing the initial priority lists, OSHA should hold public workshops at which interested persons are invited to comment on regulatory priorities.

(2) The results of meetings of the regulatory priorities committee should be made public after the Assistant Secretary has had an opportunity to review any proposed decisions of the committee.

(3) The Assistant Secretary should publish for public comment the proposed initial priority lists of rulemaking topics and, thereafter, any proposed modifications to the

lists. The topics on the lists should either be ranked individually or assigned to classes.

d. *Expedited action*. Once the initial priority lists are developed, OSHA should establish a procedure for expediting priority decisions on additional topics or modifications that are presented by referrals from EPA under the Toxic Substances Control Act, rulemaking petitions, or requests from Congress, the President, or other agencies. While separate from the agency's routine priority-setting process, this expedited process should be coordinated with it. The outcome of the expedited process should be the placement of the topic on the appropriate list, modification of a list (*e.g.*, deletion or changed ranking of a topic), or a determination not to place, or modify the placement of the topic, on the list, together with a public explanation for the action.

2. **Management of the Rulemaking Process**. This part recommends procedures that OSHA should adopt for the management of its rulemaking process.

a. *Action Tracking System*. OSHA should establish a computer status system to set deadlines for meeting established milestones in rulemaking and to provide for systematic review of the progress of ongoing rulemaking. Under this system, management officials, representing all interested agency components, should meet at regular intervals with the Assistant Secretary or a Deputy Assistant Secretary to discuss progress toward designated milestones.

b. *The Team Approach*. OSHA should establish a team concept in rulemaking. A team for each individual rulemaking, consisting of representatives of all potentially interested components of OSHA and the Department of Labor (*e.g.*, the Office of the Solicitor), should be appointed early in the rulemaking process to gather and analyze information, draft documents, respond to comments and advise the Assistant Secretary. Successfully functioning teams should be assigned to additional rulemakings where feasible.

c. *Options Review Process.* OSHA should implement an "options review" process to provide policy guidance to teams working on designated health and safety standard rulemaking.

This process[3] would provide that at least once in the early development of such rules (and perhaps again at later stages of rulemaking), the rulemaking team will identify and analyze regulatory options for consideration by a high-level agency policymaking official in an options review meeting. This meeting should produce discussion of alternative approaches for rulemaking and a narrowing of the range of options to be considered in the future; any decisions should be recorded in a memorandum that is available to the team. The options review meeting could be held in conjunction with the regular action tracking meetings recommended above (paragraph 2.a.).

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[3] The options review process herein recommended is currently employed successfully by the Environmental Protection Agency.

RECOMMENDATION 87-2:

FEDERAL PROTECTION OF PRIVATE SECTOR HEALTH AND SAFETY WHISTLEBLOWERS

Private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory actions by over a dozen federal laws. By common usage these employees, as well as others who make similar disclosures concerning fraud or other misconduct (but who are beyond the Conference's current study),[1] have become known as whistleblowers. Under current statutes, for example, nuclear power plant workers, miners, truckers, and farm laborers are specifically protected when acting as whistleblowers. Other workers may be covered under the more general protections granted by the Occupational Safety and Health Act (OSHA) or various environmental laws.

The protection provided employees by the so-called whistleblower statutes under study serves the important public interest of helping ensure the health and safety of workers in the various regulated industries or activities, as well as that of the general public. The statutes are intended to create an environment in which an individual can bring a hazardous or unlawful situation to the attention of the public or the government without fear of personal reprisal. Such disclosures can be a valuable source of information especially where the public lacks the knowledge or access to information necessary to be fully informed on these important issues.

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[1] The Conference has limited its study to health and safety related disclosures because in this area a pattern of federal statutory protections has emerged with sufficient experience to allow a study.

In its examination of the current federal statutory scheme designed to protect whistleblowers in the private sector, the Conference found that, as currently written, the various whistleblower statutes lack uniformity in a number of areas including the following:

1. Investigative responsibility is assigned to numerous agencies, including the Department of the Interior and several within the Department of Labor (DOL), with little coordination among them.

2. Adjudicatory responsibility is similarly divided. For example, while several statutes provide for adjudication by a DOL administrative law judge, others provide for decisions by different agencies or for trial in the district court.

3. Judicial review likewise differs. Some statutes provide for review in the district court, some in the court of appeals. And for some, no review is available.

4. Statutes of limitations for filing a complaint range from 30 days to 180 days.

5. Definitions of protected conduct differ according to statute. For example, protected disclosure may include any disclosure or may be more narrowly defined as disclosure to "the public," to the media, to the responsible agency, or to a union or employer. Protected conduct may or may not include refusals to work.

6. In certain cases where the designated agency declines to proceed with the complaint (under either the OSHA or the Asbestos Hazard Emergency Response Act), the complaining employee is left without any further administrative or judicial review.

As a result of these statutory incongruities, available procedures and protections may differ depending solely upon the industry to which an aggrieved employee belongs. For example, an employee seeking protection under the Clean Air Act (CAA) has 30 days in which to file a complaint, while an employee filing under provisions of the Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA) has 180 days. And while both CAA and MSAWPA violations are investigated by the Wage and Hour Division of the Department of Labor, adjudication of CAA complaints is before a DOL administrative law judge, while MSAWPA complaints are adjudicated in the district courts. The

Conference has concluded that this lack of uniformity does not appear to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years.

Accordingly, the Conference believes that omnibus whistleblower legislation providing for centralization of the investigative and adjudicative functions is needed. Because the Department of Labor now investigates and adjudicates such complaints under the majority of existing statutes, centralization in that Department is the logical choice. Although specialized expertise possessed by agencies responsible for the various regulatory programs covered by whistleblower provisions may be required in exceptional circumstances to resolve these disputes, the Conference believes that centralization is preferrable and that enforcement and adjudicative responsibilities should where feasible be assigned to the DOL.

The Conference study also discussed areas of regulation where gaps in whistleblower protection exist. These include the aviation and aeronautics industries, vessel construction and operation, and manufacturing and production of food, drugs, medical devices or consumer products generally. Where Congress has judged it necessary to regulate an industry so as to ensure the safety of its workplace, products, services or the environment, Congress should consider whether it is appropriate that enforcement of the regulatory scheme be strengthened by providing whistleblower protection for the industry's employees who report statutory violations.

The study also indicated that access to written decisional precedents in these cases needs to be improved. The Department of Labor's Office of Administrative Law Judges does not yet publish its decisions (although it has recently announced plans to do so), and a unified index for these decisions and those of other agency adjudicative bodies does not exist. Publication and indexing of existing case law should help narrow the issues for future adjudications, contribute to a sense of fairness in the adjudicatory process, and improve case management. In addition, the study found that, with certain exceptions, there is little interaction between the program agency and the investigating/adjudicating agency, thus diminishing the involvement of the lead program agencies. Procedures should be established by which program agencies provide assistance to investigative agencies, and adjudicatory agencies report decisions back to the program agency.

Finally, the Conference notes that there is a growing amount of litigation in state courts concerning whistleblowers, but does not take a position on whether federal statutes do or should preempt state law in this field. (ACUS Recommendation 84-5, Preemption of State Regulation by Federal Agencies, recommends that Congress address foreseeable preemption issues, and advises regulatory agencies to be aware of situations where a conflict might arise.)

With the increasing interest in these matters by Congress, the media and the general public, the Conference hopes that its study will provide a foundation for needed improvements.

RECOMMENDATION

I. In the interest of uniform treatment of private sector health and safety whistleblowers, Congress should enact omnibus legislation for the handling and resolution of whistleblowers' complaints. In enacting this legislation, Congress should review the categories of workers to which it is appropriate to extend whistleblower protection. As a general matter, the administration of this program should be centralized in the Department of Labor in furtherance of efficiency and harmony of results. If, however, Congress deems it necessary for a program agency to retain or receive investigative or adjudicative responsibility for whistleblower complaints, Congress should strive for uniformity in the substantive protections and procedures applicable to the separate program.[2] The omnibus and any other whistleblower legislation should include:

(A) a uniform definition of protected conduct;

(B) a uniform statute of limitations of not less than 180 days governing the filing of complaints;

(C) a uniform provision for remedies;

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[2] The Conference does not intend to suggest that whistleblower protection provisions now administered by the Department of Labor be reassigned. Nor is this recommendation intended to affect the existing jurisdiction of the National Labor Relations Board to investigate and adjudicate allegations of unfair labor practices.

(D) assignment of preliminary investigative responsibility to the Secretary of Labor[3] for all private sector health and safety whistleblowing retaliation cases;

(E) authorization for the Secretary of Labor to employ alternative means of resolving these disputes, with the consent of the parties (see ACUS Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution);

(F) provision for an opportunity by any affected person to request an on-the-record APA hearing before a Department of Labor administrative law judge and for discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts;

(G) a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and

(H) a grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements and mandatory coordination with other agencies.

II. Whether or not Congress enacts omnibus whistleblowing legislation, the Secretary of Labor should:

(A) promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of administrative law judge decisions in whistleblower cases;

(B) transfer primary private sector health and safety whistleblowing investigative responsibility to a single entity within the Department of Labor, absent compelling reasons to the contrary;

(C) develop, in consultation with the agencies responsible for the substantive regulatory programs, detailed written procedures for coordinating investigation, adjudication and follow-up in whistleblowing cases; and

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[3] All references to the Secretary of Labor in recommendations I(D)-I(H) encompass other appropriate agency heads in instances where Congress deems it necessary for a program agency to retain responsibility.

(D) in accordance with the Freedom of Information Act, 5 U.S.C. §552(a)(2)(A), index and publish all ALJ and Secretarial decisions in whistleblowing cases, including those rendered prior to the date of this recommendation.

RECOMMENDATION 87-3:
AGENCY HIRING OF PRIVATE ATTORNEYS

In 1985 the Federal Government employed over 20,000 lawyers in various positions. At the same time it spent millions of dollars to retain private attorneys to provide diverse legal services. The Federal Deposit Insurance Corporation (FDIC) and the Federal Home Loan Bank Board / Federal Savings and Loan Insurance Corporation (FHLBB) accounted for most of these expenditures. The attorney fees paid by the FDIC and the FHLBB have increased rapidly since 1982 and have been incurred primarily in their capacities as receivers or liquidators of failed financial institutions for which they have provided deposit insurance. In those cases, the legal fees and other expenses are borne by the estate of the failed bank.

However, many other federal agencies, including government corporations, utilize the services of private attorneys -- in some instances on a regular basis -- and the fees are usually paid from appropriated funds.

This recommendation results from a survey of the use of private attorneys by government agencies and consideration by the Conference of the process that should be employed in deciding whether to retain outside counsel, including the ethical concerns that may arise when outside counsel are retained. The recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established. The scope of the recommendation accordingly does not extend to instances where an agency hires an individual who may be an attorney but is clearly not being hired to act in that capacity. The scope may therefore exclude some persons who are hired to do independent research, arbitrators hired to decide personnel or other disputes, or persons hired to provide mediation or similar services in connection with negotiated rulemaking.[1]

Retention of private attorneys for litigation, where lawfully authorized, is within the scope of this recommendation. Congress has generally vested the power to litigate in the Department of Justice, although several agencies have been granted independent litigating authority by statute. Unless an agency is granted such authority, the consent of the Department of Justice is required for another agency to retain outside counsel for those purposes (5 U.S.C. §3106).

While some elements of the recommendation may state principles that are relevant to obtaining the services of other professionals, the Conference has studied only the retention of private attorneys. The focus of this recommendation on attorneys recognizes the role of the lawyer in implementing and enforcing government policy and the ethical requirements that are peculiarly applicable to attorneys.

In the private sector, it is cost-effective both to employ a full-time legal staff and to contract out some legal assignments. Many corporations have focused attention on methods to ensure that the size of the in-house staff is optimal and that work is contracted out only when necessary or for certain categories of work. Corporations have developed guidelines, criteria, and procedures to control the cost and ensure the quality of legal services.

In the public sector, concern for cost-effectiveness, a multifaceted goal which does not look at the factor of price in isolation, is also clearly appropriate. The Conference has considered whether there should be a fixed cap on hourly fees to be paid to private attorneys hired by agencies, and has concluded that a government-wide limitation is inadvisable because it may prevent the government from obtaining high quality legal services. In many cases, the aggregate cost of legal services does not depend on hourly rates alone, and all relevant facts should be considered in determining the economic efficiency of a proposed contract for legal services. It may, however, be appropriate for individual agencies to limit hourly rates for certain types of services, if such limits are set at realistic levels. In hiring private counsel, agencies can also take into consideration the attorney's willingness to negotiate fees, seeking the most competitive fees available, while securing the skills and efficiency required.

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[1] The Administrative Conference has not studied the appointment of independent counsel under the Ethics in Government Act, 28 U.S.C. §§591-598, and this recommendation does not address the selection of such counsel.

Important additional considerations bear on the decision of the federal government to rely on outside counsel. An agency should be acutely aware of the need for control over the activities of outside counsel to ensure, among other things, that the constitutional vesting of governmental authority in "officers" of the United States is observed in fact. The need for close control may vary with the circumstances, but it must assume preeminent importance in litigation.

In procuring the services of attorneys, agencies must also scrupulously avoid favoritism, or the appearance of favoritism, which can erode public confidence in the integrity and fairness of the government. Competitive procedures, whether mandated by procurement statutes or imposed as a matter of agency policy, will reduce the prospect or appearance of favoritism and result in higher quality legal services and savings in cost. Depending on the circumstances, the requisite procedures may range from a public solicitation of formal proposals to informal telephone requests to several sources for information relating to qualifications, availability, and fees. Appropriate competitive procedures should consider both cost and the more subjective elements of professional skill and efficiency.

Attorneys performing work for the government must maintain the highest ethical standards. They should be particularly sensitive to questions of appearances and propriety. Neither the circumstances of their retention nor their conduct of their engagement should provide the slightest basis for loss of public confidence in the administration of justice or the integrity of the governmental process.

The hiring of outside counsel may raise important questions regarding conflicts between the interests of the government and others, which federal criminal law (18 U.S.C. §§ 202 et seq.), ethics rules applicable to federal employees, and codes of professional responsibility seek to guard against. The principal ethical problem for outside attorneys involves simultaneous representation of the agency and, in a separate matter, a private party whose interests are adverse to the agency or the related interests of another agency. An important additional question is presented when an attorney or firm appears before an agency in a non-adversarial role on behalf of one client while simultaneously acting as attorney for the agency in a different matter.

The government, like any client of a private attorney, may consent to representation of adverse interests by its outside counsel. Any such consent, however, should be fully informed. Accordingly, to afford full protection to the government and the public, every effort must be made to identify conflicts or potential conflicts before work is contracted out, and to assure that, during the course of the representation, previously unanticipated problems are immediately disclosed so that the agency may take appropriate action.

Retainer agreements should identify the "client" with specificity and address questions related to existing or potential adverse representations. In many instances, only the agency that retains the private attorney will have an interest in the subject matter of the engagement, and in those instances that agency should ordinarily be considered the "client." This would have the effect of allowing outside counsel to appear before, or represent interests adverse to, other Executive Branch agencies in unrelated matters. Where broader interests of the government may be implicated, the agency retaining outside counsel will need to take those interests into account when drafting the retainer agreement.

To assure that all of these concerns are taken into account, any agency that anticipates a need to hire private attorneys should prepare written public guidelines concerning when and how it will seek outside counsel. As an element of agency control and to avoid later misunderstandings, appropriate written instructions should be given to attorneys when they are retained. The FDIC, FHLBB, and the Department of Justice have developed documents for these purposes, and agencies drafting guidelines and instructions should refer to them as possible models. Agencies may also find useful models in the private sector for some elements of their guidelines.

To respond to the concerns surrounding government use of outside counsel, agencies should prepare an annual public report listing basic information relating to legal service contracts awarded.

RECOMMENDATION

1. Scope of Recommendation

This recommendation applies to any agency that hires private attorneys to represent the agency or to provide it with legal advice, i.e., where an attorney-client relationship is established.

2. Use of In-House Government Attorneys

(a) Government agencies should continue to obtain most of the legal services that they need from government attorneys.

(b) When agencies cannot develop the necessary legal resources in-house, they should explore the possibility of utilizing the expertise found at other agencies of the government, on a temporary or short-term basis. The Office of Personnel Management should establish a procedure for sharing information among agencies on the kinds of legal resources available within the government.

3. Guidelines for Hiring Outside Counsel

Each agency that anticipates a need to hire private attorneys should prepare written public guidelines detailing: (a) the criteria for deciding whether or not to seek outside legal assistance, (b) the factors relevant to the choice of attorney or firm, (c) the procedures for procurement, (d) appropriate limitations on counsel's authority, (e) conflict of interest and other ethical considerations, (f) billing practices, and (g) procedures for review of fees.

4. The Decision to Hire Outside Counsel

When an agency is considering whether to hire outside counsel, the agency should first assure itself (a) that it is authorized by law to hire outside counsel for the particular matter, (b) that it can exercise sufficient control over the performance of the services to be obtained, and (c) that such employment is cost-effective. The price of the services should not, however, be the sole test of cost-effectiveness. Also of importance in assessing the benefit to be gained from the use of outside counsel are the quality of the services provided, the availability of necessary expertise within the agency, and the need for an outside independent perspective.

5. Competition

In obtaining outside counsel, the agency should employ appropriate competitive procedures to assure that the requisite quality of service is obtained at a reasonable price without the fact or appearance of favoritism. The Office of Federal Procurement Policy should review the existing provisions of the Federal Acquisition Regulation to ensure that legal services can be procured consistently with the objectives of this recommendation.

6. Control of Performance

The contracting agency should retain such control over the performance of outside counsel as is necessary to assure that the governmental and public interests at stake are fully protected. To facilitate control, the agency should at the outset provide the attorney with specific written instructions regarding the conduct of the professional representation. Control is particularly important where the outside counsel is engaged to represent an agency in litigation.

7. Public Reports

Each agency that hires outside counsel should prepare and maintain in the office of its chief legal officer an annual public report, listing for each occasion on which outside counsel has been retained: (a) the attorney or firm and the type of work involved, (b) the reasons for engaging outside counsel, (c) the competitive procedures used, if any, (d) the fee range or other basis for compensation, and (e) the actual fee paid. For cases involving small amounts, aggregate figures would be acceptable.

8. Ethical Considerations

(a) An agency should require outside counsel whom it plans to hire to disclose fully and in writing all existing or potential conflicts of interest. The disclosure should include all matters that the attorney's firm has pending before, or reasonably expects to come before, that agency. The agency should then decide whether to proceed with the hiring in light of the information provided. If the attorney-client privilege or other rules prevent outside counsel from making full disclosure to the agency, then the outside counsel should not be employed. The agency's agreements with outside counsel should specifically identify the types of professional employment that cannot be undertaken because of the attorney's service to the agency.

(b) Federal agencies and such private attorneys as they retain should be mindful of the constraints imposed by statutes, regulations, executive orders, codes of professional conduct, and any applicable guidelines that pertain to conflict of interest and other potential ethical problems. Such provisions and guidelines should be explicitly identified and incorporated in the agency's contracts with outside counsel.[2]

(c) When an attorney retained by an agency is not a special government employee within the meaning of 18 U.S.C. §202(a), at a minimum those restrictions which apply to such employees should be adopted by the contract with the attorney unless they are clearly inappropriate. Such restrictions include rules of employee responsibilities and conduct contained, for example, in 5 CFR Part 735.[3]

(d) The Department of Justice and the Office of Government Ethics should provide guidance on the applicability of 18 U.S.C. §§203-208 to agency hiring of outside counsel. Subject to that guidance, agency guidelines should provide that, for purposes of disqualification based on prohibitions against simultaneous or sequential representation of opposing parties, different departments or independent agencies of the federal government should normally be considered to be different clients.[4]

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[2] The contract should indicate whether and to what extent outside counsel may take inconsistent positions on behalf of an agency and a private client.

[3] See 5 CFR §§ 735.301-.306, which prescribe ethics and conduct rules for special government employees. See, particularly, 5 CFR § 735.301, which advises agencies that appropriate ethics and conduct rules for regular employees, stated elsewhere in Part 735, may also be made applicable by regulation to special government employees.

[4] This paragraph of the recommendation refers to "clients" solely for the purpose of determining disqualification. The implicit premise of the recommendation is that the Executive Branch is a unitary entity whose interests and legal positions are

The guidelines should also provide that, if more than one agency has a common interest in the matter, then the definition of "client" should include any such agency or agencies. The guidelines should also make clear that all lawyers in the firm, including all branch offices of the firm, are subject to the applicable restrictions on simultaneous or sequential representation, and that these restrictions apply not merely to litigation, but to all matters in which an attorney-client relationship has been established.[5]

(e) The guidelines should also address the varying circumstances in which an attorney may represent other clients in matters involving the agency. The guidelines should identify those situations that should be avoided.

(f) If a private attorney represents the same agency frequently, then their relationship should be considered as a continuing one. In such a situation, neither the attorney nor the attorney's firm should agree to represent another client in a matter involving the client agency without the agency's explicit consent, even if, at that time, the attorney is not representing or advising the agency on a specific matter.

9. Limitations on Hourly Rates

No government-wide limitation on hourly rates should be established for hiring of private counsel. It may be appropriate for agencies to set a fixed cap on hourly rates that they pay to private attorneys for routine legal tasks; a higher fee cap may be appropriate for unusual or complex legal work. Such limits, if adopted, should be set at realistic levels, in line with fees typically charged for similar services in the same locale, so that agencies hiring outside counsel will be able to obtain the needed degree of expertise.

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determined by the President or his delegates, including the Attorney General.

[5] The Department of Justice should consider, in accordance with Recommendation 84-5, 1 CFR §305.84-5, whether to issue a regulation that explicitly preempts any state rule of attorney practice that is in conflict with its guidance.

RECOMMENDATION 87-4: USER FEES

There is widespread interest in Congress and the Executive Branch in instituting user fees in certain government programs. Although a general user fee statute (31 U.S.C. §9701) dates to 1952, recent studies, including a report of the President's Private Sector Survey on Cost Control, have urged expanded application of such fees. In light of these developments, the Administrative Conference has undertaken a study of the user fee concept in cooperation with the Office of Management and Budget and other federal agencies.

The decision to institute a user fee for a particular service or good is a policy decision for Congress and the Executive Branch to determine, and the Conference does not address this subject. Nevertheless, when Congress or an agency establishes a user fee, that action should be based upon general principles that guide the setting and implementation of fees. The Conference, therefore, in this recommendation seeks to provide a set of such basic principles.

In this recommendation "user fee" means a price charged identifiable individuals or entities by the federal government for a service or good which the government controls. The recommendation addresses only the institution and implementation of user fees to promote the efficient and fair allocation of government services and goods. Accordingly, the Conference does not address the imposition of charges intended primarily to enhance federal revenues or primarily to encourage or discourage behavior unrelated to resource allocation.

RECOMMENDATION

A. Benefits

A government service for which a user fee is charged should directly benefit fee payers. A service provided by the government as a condition to the pursuit of commercial or other activity (*e.g.*, inspections) may properly be regarded as a benefit to the fee payer where it confers an advantage on the fee payer or lessens the fee payer's imposition of costs or risks on others or on society as a whole.

B. Basic Considerations for Establishing Fee Levels

1. Market and Cost Considerations.

When Congress or an agency establishes a user fee for a service or good provided by an agency, the fee should rest on market factors where possible. In the absence of a reliable market price, the fee normally should cover the agency's costs, including all related processing costs and that portion of other agency costs properly allocable to the service or good provided (such as anticipated capital replacement or repair costs).

2. Other Considerations.

a. When criteria other than those set forth in paragraph 1 above (*e.g.*, national policy objectives, program goals or fairness) influence the decision to establish fees, the costs to be recovered, or the granting of waivers or reductions, agencies should explain the criteria used and the rationale for their selection.

b. Where third parties or the general public benefit significantly from a governmental service, user fees need not be set to recover fully the cost of providing that service. Agencies should consider the practicability of allocating costs between fee payers and others when determining the proportion of service costs to be recovered by user fees (as opposed to alternative financing mechanisms).

c. The fee level may be set without regard to the distribution of benefits among the customers, employees and owners of the fee payers. However, selection of the point of collection should take into account the costs of administration.

C. Disposition of Fee Receipts

The Conference takes no position on whether fee receipts should be deposited in the Treasury general fund or earmarked to a specific fund. In either event, agencies administering programs that collect fees should be provided with funds sufficient to provide adequate service. In enacting a user fee, Congress should specifically address the issue of how the proceeds are to be used.

D. Implementation of Principles

Congress in revising or enacting user fee legislation, and the Office of Management and Budget in providing implementation guidance and other information on user fees to agencies, should incorporate the principles set out in this recommendation. Agencies should review their user fee statutes and existing programs to determine whether changes are necessary to implement these principles.

RECOMMENDATION 87-5: ASSURING THE FAIRNESS AND ACCEPTABILITY OF ARBITRATION IN FEDERAL PROGRAMS

The Administrative Conference has recommended that agencies employ alternative means of dispute resolution (ADR) in federal programs.[1] ADR techniques for rulemaking include structured negotiation and mediation; for adjudication, they also include arbitration, factfinding and minitrials.[2] The bulk of these techniques do not alter the placement of policymaking authority within the agencies, and therefore pose few of the legal and policy concerns of binding arbitration, which typically involves the use of outside arbitrators authorized to make decisions binding upon the government. If an arbitrator decides a claim by or against the government, public money will be involved. Arbitration decisions concerning other issues in administering a federal program, such as the resolution of enforcement cases or disputes between the agency and its employees, affect administration of the program. In programs where the agency's role is to resolve disputes between private parties, arbitrated disputes will relate to the purposes of the program, for example by resolving disputes related to program administration. In addition, the Constitution requires that significant duties pursuant to public law must be performed by Officers of the United States and their employees. These concerns can be met if Congress, in authorizing the use of arbitration, or the agency, when adopting arbitration, confines it to appropriate issues and provides for the agency's supervision of arbitration.

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[1] *See generally* Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR § 305.86-3.

[2] *See* Recommendation 82-2, *Resolving Disputes Under Federal Grant Programs*, 1 CFR § 305.82-2; Recommendations 82-4 and 85-5, *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4 and .85-5; and Recommendation 84-4, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4.

Existing law authorizes resort to arbitration in a variety of different contexts, including claims by and against the government, disputes between private individuals that are related to program administration, and labor relations issues between the government and its employees. Recommendation 86-3 calls on Congress to act to authorize agency officials to choose arbitration to resolve many additional disputes.

This recommendation contains procedural advice for Congress, and occasionally agencies, in an effort to ensure the fairness and acceptability of arbitration in federal programs. The criteria are necessarily general, and the appropriateness of particular arbitral procedures must be judged in the context of the particular functions they serve. Agencies are generally in the best position to assess the need for informal and expeditious process, and to weigh that need against considerations of accuracy, satisfaction, and fairness. While the Conference encourages granting agency officials broad "on-the-spot" discretion to use arbitration, it recognizes the need for preliminary steps to meet concerns that the process provide some executive oversight, preserve judicial functions and ensure quality decisions, and maintain legality and fairness. This recommendation sets forth procedural criteria to aid Congress and agencies in taking these first steps.

RECOMMENDATION

1. In all cases, congressional authorization for voluntary binding arbitration, whether performed by government employees or private arbitrators, should ensure that Congress has made, or the agency will make, an explicit judgment that arbitration is appropriate for the case or class of cases in question. Criteria for determining whether arbitration is appropriate include the following:

(a) Cases subject to arbitration should involve questions of fact or the application of well-established norms, even if statutory, rather than precedential issues or application of fundamental legal norms that are evolving.

(b) In determining whether to employ arbitration, Congress or the agency should consider the nature and weight of the private interests involved, the nature and weight of the government's interests, and the tradeoffs between the costs and benefits of arbitration and those of more formal processes. A heavy adjudicative caseload and the particularization of decisions in accord with previously declared guidelines justify the use of private arbitrators or other non-government persons .

2. Congress should assess the desirability of mandatory arbitration in light of the extent to which a person's participation in the affiliated program is voluntary.[3] For example, participation in an entitlement program is more likely to reflect need than consent, and should not be regarded as consent to arbitration of eligibility.

3. Congressional authorization for arbitration should ensure that:

(a) The agency has an opportunity to choose whether to resort to arbitration,[4] and to review the overall composition of any arbitral pool to ensure its neutrality and, where appropriate, specialized competence. Agencies should either employ arbitral pools and procedures that are well-established, such as those of the AAA, or should develop rosters or pools to meet their special needs;[5]

(b) Parties to an arbitrable controversy, including an agency, have a role in the selection of the arbitrator, consistent with preserving the neutrality of the decider, for example by striking names from a list; and

(c) Arbitral awards are reviewed by agencies or by courts under the criteria of the U.S. Arbitration Act, which authorizes review of the facial validity of the award and the integrity of the process. Agencies can be authorized ordinarily to review individual awards with no specific provision for judicial review.[6]

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[3] *See* Recommendation 86-3, ¶¶ 7-9, *Agencies' Use of Alternative Means of Dispute Resolution*, for other limitations on the use of mandatory arbitration.

[4] *See Id.*

[5] *See* Recommendation 86-8, ¶ 1(c), *Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution.*

[6] *See* Recommendation 86-3, ¶ 4, *Agencies' Use of Alternative Means of Dispute Resolution.*

If so, no special provision need be made for judicial review of individual awards. Judicial review of the overall structure and fairness of the arbitration program should suffice. In the rare case in which a serious constitutional issue attends an individual arbitration, such as an allegation of a taking, existing law provides avenues for relief.

4. Agencies should ensure that the standard for arbitral decisions is reasonably specific, by promulgating administrative standards where statutes do not sufficiently guide arbitral decision. A substantial justice standard for arbitral awards should be used only when explicitly approved by the agency, because of the resulting difficulties of administrative or judicial review of the outcome. The sufficiency of other standards should be judged by whether the parties can consent meaningfully to arbitration and can prepare their cases, whether the arbitrators can produce reasonably consistent decisions, and whether reviewing entities can judge the facial validity of awards.

5. The following considerations should govern the ongoing administration of arbitral programs:

(a) Agencies should be careful to preserve the objectivity of arbitration by avoiding instructions or forms of oversight that would threaten to undermine the arbitrator's neutrality in a particular case. Plainly, however, generally applicable indicators of pertinent governmental policy, such as interpretive regulations, are meant to be controlling, whether proceedings be in the form of arbitration or agency adjudication.

(b) Authority to determine the arbitrability of particular disputes can be placed in the courts, as under the U.S. Arbitration Act, or in another neutral third party, such as the administering agency where arbitration concerns private parties, or in an agency other than one which is a party to arbitration.

(c) Interpretive rulemaking can alter the standards for future arbitration when monitoring of awards reveals outcomes inconsistent with the agency's expectations in employing arbitration.

RECOMMENDATION 87-6: STATE-LEVEL DETERMINATIONS IN SOCIAL SECURITY DISABILITY CASES

In Fiscal Year 1986, nearly two and one half million individuals applied for disability benefits under two federal programs administered by the Social Security Administration: Retirement, Survivors, Disability and Health Insurance (RSDHI), and Supplemental Security Income (SSI). Payments made annually to their seven million beneficiaries totalled twenty-nine billion dollars during that period. Certain aspects of this enormous benefit program have recently been subject to close scrutiny to determine whether greater efficiency is possible.

In order to be eligible for either program, a claimant must meet medical and other criteria. The RSDHI program operates as an insurance plan. A worker qualifies by earning a sufficient amount of wages for a required period of time. By contrast, the SSI program is a welfare program whose non-medical criteria are met by a demonstration of need.

If a claimant meets the criteria for either plan, he or she must then meet the medical criteria for disability in order to establish eligibility for benefits. The basic statutory test is identical for both RSDHI and SSI:

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less

> than 12 months. 42 U.S.C. §§423 (d)(1)(A); 1382c(a)(3)(A). [See also 43 U.S.C. §423(d)(2)(A) which liberalizes the work requirement somewhat.]

Claimants begin the application process by filing an application at a Social Security Administration office. If a claimant meets the non-medical criteria, the file is then forwarded to a federally-funded and SSA-regulated state Disability Determination Service (DDS) for a determination as to disability. A two-person team consisting of a "disability examiner" and medical consultant (a physician employed by DDS) reviews the medical evidence and reaches its decision. The claimant is not present at any time during the process.

A claimant who is dissatisfied with the initial determination (about 60% are denials) has 60 days in which to seek a reconsideration. Reconsiderations are also performed at the state DDS level, and are essentially a repeat of the initial determination process, but with different personnel acting as decisionmakers. The record may be supplemented at this time, but as with the initial determination process, the claimant does not appear. In FY 1986, about 40% of denied claimants (totalling 380,000) sought reconsideration and about 17% of those received favorable re-determinations.

Further review is available at the ALJ and Appeals Council stages. See Recommendation 87-7 for a description of these later review stages.

Several areas pertaining to the disability determination, hearing and review process have been subject to criticism. First, the current system, with its four tiers of successive review, often results in the replacement of one decisionmaker's determination with that of the next, but without necessarily improving the quality of any of the actual decisions. Second, because there is little cost to filing an administrative appeal (and everything to gain in doing so), there is correspondingly little incentive for a claimant to accept any unfavorable determination as final. Accordingly, there is a wide stream of cases all the way to the end of the process. Moreover, claimants whose cases are decided without a personal appearance before the decisionmaker (as is the case in three of the four review stages) frequently feel dissatisfied with the process, that they have not received their "day in court."

In addition, courts, members of Congress, and the system's clients have all indicated that their confidence in the system has deteriorated to the point that its integrity has suffered. The public's faith in this institution is essential to its success in the long run.

In efforts to improve the administration of the state-level determination process, the stage at which the caseload stream is the widest, Congress and SSA have engaged in some modifications of the system as well as some experimental procedures. By 1983, a large increase in appeals from terminations of benefits in continuing disability review (CDR) cases had begun to flood the system. In such cases SSA performs reviews on existing beneficiaries to determine whether the disability still exists. If the determination is negative, a notice of termination is sent, triggering the above-described review process. Congress reacted to this by passing P.L. 97-455, which gave the option to claimants of an "evidentiary hearing" at the reconsideration stage in all CDR cases. Although a moratorium in CDR cases slowed the institution of this procedure, it is now in place and specially trained hearing officers are conducting these relatively formal proceedings.

In 1984 (P.L. 98-460), Congress mandated demonstration projects in selected DDS offices to try a one-step proceeding, allowing a personal interview but eliminating the reconsideration step. In five states, the interview was to be used in initial determinations, and in five other states it was to be used in place of the evidentiary hearing in CDR cases. These demonstration projects are currently underway, and results are limited. Although preliminary, the experience with evidentiary hearings and the demonstration projects with personal interviews give rise to the following conclusions:

-- face-to-face procedures are more satisfactory to claimants than are paper reviews, resulting in claimants feeling that they received a fair hearing;

-- face-to-face procedures are helpful to decisionmakers, in many instances providing them with evidence not ascertainable from the paper file.

If the final results of the demonstration projects are consistent with these initial findings, it is probable that by implementing some kind of a face-to-face proceeding at the state level, awards of benefits that ultimately would be made later in the system will be made at the outset. This will have the effect of decreasing the caseload at later levels, both for ALJs and the Appeals Council, and for federal courts. Overall costs to the system would thereby be reduced as well.

At the request of the Social Security Administration, the Administrative Conference has undertaken a preliminary review of the disability determination process at the state level. The Conference makes the following Recommendations, based on that study.

RECOMMENDATION

The Conference supports Congressional and Social Security Administration (SSA) efforts to improve the procedure by which initial and reconsidered disability determinations are made by state Disability Determination Service (DDS) offices. Although existing experience with use of evidentiary hearings at reconsideration is sparse, and experiments using a single-step determination (after a personal interview, but without reconsideration) are at an early stage, some preliminary suggestions can be made to SSA:

1. Experiments and demonstration projects concerning use of face-to-face procedures at the initial determination stage should be continued and encouraged. SSA should conduct thorough and careful evaluations of both the evidentiary hearing procedure now used in continuing disability review (CDR) cases and the personal interviews now being tried in selected state demonstration projects and should make prompt reports to Congress.

2. Full implementation of evidentiary hearings (for other than CDR cases) or personal interviews (either at the initial or reconsideration stage) should await the final report on the current experiments by the Department of Health and Human Services (HHS).

3. HHS's reports concerning the use of face-to-face procedures should include consideration of the cost of full implementation of evidentiary hearings or personal interviews at the initial or reconsideration stage. Should cost considerations militate against full implementation of such hearings or interviews, SSA should consider the feasibility and fairness of permitting some kind of a hearing or interview on a discretionary basis subject to appropriate published guidelines where either the claimant's file, type of medical condition or the opinion of the

examiner indicates that such a procedure would be of significant assistance to the ultimate determination.

4. In analyzing the results of the procedures and the ongoing experiments at the DDS level, SSA should develop accurate measures of efficiency and associated record-keeping requirements. Specifically, such measures of processing time should take into account post-interview time expended waiting for third party responses to requests for additional case development. Any measures of efficiency adopted by SSA should not serve to discourage the use of comprehensive interviews.

5. In analyzing the procedures and ongoing experiments (and in any future analyses), SSA should review the reasonableness of variations between DDS offices in their award rates and other aspects of case handling, in light of state-by-state variables that can affect the disability determination process.

6. SSA should proceed with caution before taking the position that face-to-face hearings or interviews at the DDS level would be an adequate substitute for the opportunity for an adjudicatory hearing before a SSA administrative law judge (ALJ). Rather, such modifications to the DDS process should be seen as a possible way of reducing the number of appeals to the later stages of the process.

7. Close scrutiny should be given to any legislative or other proposals to completely eliminate the reconsideration stage, taking into account the impact of that step on overall processing costs, and on the caseload at the ALJ stage. Any such proposals to convert the two DDS stages into a single stage should consider the need to allow some type of a face-to-face proceeding at that stage, as provided for in the demonstration projects.

8. Before instituting evidentiary hearings (for other than CDR cases) or personal interviews in all DDS offices, SSA should consider (a) decentralization of DDS offices into decisional units to minimize travel costs and (b) the need to select and train a sufficient number of personnel qualified to conduct such hearings or interviews.

9. The record in disability appeals should not be closed until completion of the ALJ stage -- that point in the process at which claimants now are more likely to be represented by attorneys or other advocates.

10. SSA should conduct a study of: (a) the reference sources of claimants (e.g,. referrals from state welfare agencies, private insurance carriers, etc.) to determine whether such referrals are a source of excessive numbers of claims that are later determined to be unmeritorious, (b) the nature of "dropouts," claimants who fail to pursue their appeal rights, to determine why this occurs, and (c) the number of claimants who reapply in lieu of appealing, and the reasons therefor.

RECOMMENDATION 87-7:
A NEW ROLE FOR THE SOCIAL SECURITY APPEALS COUNCIL

The Social Security disability system is described generally in Recommendation 87-6 which focuses on the initial determination process at the state-level Disability Determination Service (DDS) offices. This Recommendation addresses the later stages of review by the Social Security Administration (SSA).[1]

The first stage of review by federal decisionmakers is the third step in the process for disability claimants. Claimants disappointed after state-level initial and reconsideration determinations may then demand a hearing before an administrative law judge (ALJ) employed by the Social Security Administration. About 65% of such claimants do so. This is the first time in the process (except in certain demonstration projects or cases involving the termination of benefits) that a claimant has a face-to-face encounter with the decisionmaker. The hearings are de novo, and generally follow Administrative Procedure Act guidelines. Approximately 50% of appeals taken to an ALJ hearing result in the award of benefits.

The fourth, and final, level of administrative review is to the Social Security Appeals Council. This twenty member body, created by regulation, and chaired by the Associate Commissioner for Hearings and Appeals, disposes of a staggering 50,000 cases annually. (About 40% of claimants who lose at the ALJ stage appeal.) In addition to appeals from ALJ decisions, the Appeals

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[1] The Conference has previously addressed elements of the Social Security appeals process (focusing primarily on the ALJ hearing stage) in Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 1 CFR §305.78-2.

Council reviews, on its "own motion," selected cases where there has been a grant of benefits. The Appeals Council relies on analysts in its companion unit, the Office of Appeals Operations (OAO), to screen cases and make recommendations concerning disposition of the cases. Council members hold the same salary grade level as SSA ALJs. They perform purely a paper review on cases that are forwarded to them by OAO and assigned to them individually based on the geographical origin of the case. The Appeals Council acts on each appeal, although in most cases the request for review is summarily denied or dismissed. Because of the demands on each member (up to 500 cases per member per month), a typical case is likely to receive less than 15 minutes of paper review by the member. The Council almost never sits in panels or conducts oral arguments. In recent years, approximately 5% of the cases reviewed result in reversals (i.e., awards of benefits), and another 7 to 15% are remanded to the ALJ.

After exhaustion of state and federal administrative remedies, a claimant may seek judicial review in the federal district court. In the years 1981 to 1986 the number of new SSA disability cases filed in the courts ranged from 9,000 to 26,000 per year.

In past years, the Appeals Council has to some extent played a policy-relevant role. Yet, as its caseload increased, it was by necessity limited to a narrow case correction function. Accordingly, its members had little time to devote to policy matters. Recently, the Appeals Council has come under attack from many fronts, including Congress, claimants and their representatives, and academicians, who have questioned both the Appeals Council's usefulness as an additional step in the adjudicative chain and the resulting delays caused to claimants who wish to proceed to court.

Critics have complained that the rate of reversals is so low that it fails to compensate for the additional delay caused to claimants who wish to seek judicial review. The Conference's study noted that because its members are so driven by the "tyranny of the caseload," it has failed to take advantage of its unique position as the final administrative review body--one that sees a diverse number of disability cases, and accordingly, can detect emerging problems, and identify new issues to be resolved and policies to be developed. Thus, any capabilities it should have in promoting consistency of lower-level decisionmaking, and policy integrity throughout the system, are thwarted, and it is left with little more than a case-handling role.

The Social Security Administration requested the Administrative Conference to study and analyze the operation of the Appeals Council.

Serious consideration was given to recommending outright abolition of the Appeals Council. This view was premised on the Appeals Council's present inability to do little more than add one more layer to the already-lengthy review bureaucracy. (This criticism was not intended as a denigration of Appeals Council members, whom the study found to be competent, dedicated, and cooperative.) Before recommending such a drastic, and irreversible step, however, the Conference felt that an attempt should be made to use the unique perspective and expertise of the Appeals Council to help correct the existing problem. The Conference believes that fundamental changes are needed to reduce the Council's caseload to a more manageable volume so that individual cases can be given more attention and the Council can be a significant contributor to agency policymaking. Accordingly, to implement a systems-reform function for the Appeals Council, the Conference makes the following Recommendations for modification of its structure, purpose and operations.

While the recommendation anticipates a reduced volume of cases for the Appeals Council, the Conference believes that improved fact-finding will result from the changes in initial determinations (*see* Recommendation 87-6), and that this will compensate for diminished factual review at the Appeals Council stage.

RECOMMENDATION

1. The Social Security Administration (SSA) should, as soon as feasible, restructure the Appeals Council in a fashion that redirects the institution's goals and operation from an exclusive focus on processing the stream of individual cases and toward an emphasis on improved organizational effectiveness. To that end, the Appeals Council should be provided the authority to reduce significantly its caseload and also be given, as its principal mandate, the responsibility to recommend and, where appropriate, develop and implement adjudicatory principles and decisional standards for the disability determination process. In particular, SSA should adopt the following structural reforms to improve the Appeals Council's ability to perform its new function.

a. *Focus on System Improvements.* SSA should make clear that the primary function of the Appeals Council is to focus on adjudicatory principles and decisional standards concerning disability law and procedures and transmit advice thereon to SSA policymakers and guidance to lower-level decisionmakers. Thus the Appeals Council should advise and assist SSA policymakers and decisionmakers by:

    (1) conducting independent studies of the agency's cases and procedures, and providing appropriate advice and recommendations to SSA policymakers; and

    (2) providing appropriate guidance to agency adjudicators (primarily ALJs, but conceivably DDS hearing officers in some cases) by: (a) issuing, after coordination with other SSA policymakers, interpretive "minutes" on questions of adjudicatory principles and procedures, and (b) articulating the proper handling of specific issues in case review opinions to be given precedential significance. The minutes and opinions should be consistent with the Commissioner's Social Security Rulings. Such guidance papers should be distributed throughout the system, made publicly available, and indexed.

b. *Control of its Caseload.* In order to fulfill its responsibility to develop, and to encourage utilization of, sound decisional principles and practices throughout SSA, the Appeals Council must be empowered to exercise its review sparingly, so that it may concentrate its attention on types of cases identified in advance by the

Appeals Council. These types of cases might include a small sample of random cases or categories identified by the Secretary of Health and Human Services from time to time. To that end, the Secretary should direct the Appeals Council to design a new review process, subject to the Secretary's approval, that would continue to be part of the available administrative remedy for a claimant dissatisfied with an administrative law judge's (ALJ's) initial decision, but that would enable the Appeals Council to deny a petition for review if the issues it sought to raise are deemed inappropriate for the Appeals Council's attention. If a petition for review is denied, the ALJ's decision should be deemed to be final agency action.

c. *Improved Review of Individual Cases.* The Appeals Council, given a reduced caseload, should upgrade its handling of individual cases. In particular the Council should:

(1) work more collaboratively, including as appropriate, considering cases en banc or in panels;

(2) encourage claimant's representatives to submit briefs (including amicus briefs) on selected issues and evaluate the benefits of encouraging oral arguments in appropriate cases (utilizing existing authority to reimburse participants as necessary);

(3) write more elaborate opinions, providing better reasoning and legal analysis and relying less on boilerplate and verbatim recitation of records;

(4) avoid substitution of judgment on ALJ factual determinations;[2]

(5) significantly reduce the time needed to initiate or deny review of cases and issue a final decision in most cases within 90 days of accepting review, unless an extension or delay request by a claimant is granted for good cause; and

(6) specify that once the period for accepting review has passed, ALJ decisions should be deemed to be final agency action, and should be subject to reopening by the Appeals Council only in accordance with existing standards.

d. *Enhancement of Status of Appeals Council.* SSA should improve the status of the Appeals Council and insure high caliber appointment by:

(1) reducing the size of the Council so that the Council can meet and act more collegially;

(2) upgrading the salary level of members so that it is one level above SSA ALJs;

(3) providing the members, by regulation, with the same civil service protections as accorded to career service personnel and by providing ALJs who agree to serve on the Council with assurances that they will receive reappointment to

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[2] In conjunction with this reliance on the record below, the Appeals Council should not permit new evidence to be introduced without good cause, although motions to remand to the hearing stage should be permitted. See Recommendation 78-2, ¶ (c)(1); 1 CFR §305.78-2(c)(1).

their former position upon completion of service; and

(4) establishing merit selection criteria for appointment to the Appeals Council, giving preference to prior experience as an ALJ.

e. *Enhancement of Support Systems.* SSA should improve the support system provided to its Appeals Council by reorganizing the Office of Appeals Operations, providing law clerks to assist members, and updating production and communication systems.

f. *Enhance the Appeals Council's Visibility.* The Appeals Council should enhance its visibility both inside and outside the agency by reinstating the "visiting ALJ" program,[3] instituting exchange programs with other SSA components, seeking publication of precedent by a recognized reporter service, and encouraging other outreach and bar-related activities.

2. If the reconstituted Appeals Council does not result in improved policy development or case-handling performance within a certain number of years (to be determined by Congress and SSA), serious consideration should be given to abolishing it.

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[3] The visiting ALJ program allowed for one-month temporary duty by an ALJ on the Appeals Council. SSA should consider longer intra-agency details in the future.

RECOMMENDATION 87-8:
NATIONAL COVERAGE DETERMINATIONS UNDER THE MEDICARE PROGRAM

In 1986, the Administrative Conference undertook a broad overview of the administrative procedures employed by the federal government (primarily the Health Care Financing Administration within the Department of Health and Human Services) in administering and deciding appeals under the Medicare program. Recommendation 86-5, *Medicare Appeals*, 1 C.F.R. § 305.86-5, urged the Health Care Financing Administration (HCFA) to improve its system for publishing, updating, and making accessible the standards, guidelines and procedures used in making coverage and payment determinations in the Medicare program. The recommendation also suggested some improvements in the administrative appeals system and listed some fruitful areas for further research.

This recommendation builds on Recommendation 86-5 by focusing on a major aspect of the Medicare program: the making of policy concerning what aspects of medical care are covered by, and therefore reimbursable by, the Medicare program. Implementation determinations must be made every day on a case-by-case basis by Medicare contractors (peer review organizations, carriers and fiscal intermediaries such as Blue Cross). In most of these cases the coverage question involves a determination of whether an item or service was medically necessary for the individual or was furnished in the appropriate setting. Typically, the Medicare contractor has considerable discretion in ruling on individual claims although that discretion is bounded by policy pronouncements made in various ways by HCFA. If an individual claim for reimbursement is denied by the Medicare contractor, the claimant (whether a beneficiary or provider of care) may appeal the denial of claims over $500 to an administrative law judge and then further appeal to a federal district court for claims over $1,000. Recent legislative restrictions, however, have further limited claimants' opportunities to challenge coverage determinations in court or before an ALJ, and it is difficult for equipment manufacturers to participate in or challenge national coverage determinations even though their financial stakes can be significant.

HCFA makes coverage policy in a number of ways.[1] In some cases Medicare contractors refer questions about new medical procedures or technologies to the HCFA regional or national office which makes an informal judgment for application in that case. In other cases HCFA makes "national coverage determinations" which apply in all future similar cases. Since the beginning of the program HCFA (and its predecessor agency) have made about 200 such national determinations on medical procedures and technologies, and the number made each year is growing. However, in its recent Federal Register notice, HCFA stated that a "national coverage determination" included any coverage policy published in any HCFA manual. Such rulings are published either in the Federal Register or the Medicare Coverage Issues Manual, although many other coverage policies are published in other manuals that are less widely available, and are not designated as national coverage determinations.

Although the making of these national coverage determinations constitutes rulemaking, HCFA does not use a notice-and-comment procedure in most cases. HCFA's Bureau of Eligibility, Reimbursement and Coverage normally simply makes rulings on coverage determinations referred from contractors unless it determines that a medical question is presented. In such cases the question is referred to the in-house HCFA Physicians Panel which meets in private to decide on these referrals. The Physicians Panel may recommend a further referral to the Public Health Service's Office of Health Technology Assessment (OHTA). Most referrals to OHTA are in the form of informal inquiries, without public notice, after which OHTA simply conducts in-house investigations and reports back to HCFA. Requests for full

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[1] HCFA's procedures for making national coverage policy had not been published until April 29, 1987 when under court order, the agency issued a notice in the Federal Register describing its process (though not its criteria) and sought comments.

OHTA assessments, on the other hand, usually result in a Federal Register notice and widespread consultation with affected groups. In either event, OHTA makes a recommendation to HCFA which then makes and publishes the determination. Only then are the OHTA findings disclosed.

Except in these "formal OHTA assessments," beneficiaries, providers and manufacturers have no opportunity to participate in this policymaking process. Nor are the criteria used by HCFA and the Medicare contractors in making this policy identified or published. Moreover, once the policy is announced, opportunities to challenge it have been severely circumscribed by the 1986 Omnibus Budget Reconciliation Act. (Pub. L. 99-509, § 9341; 42 U.S.C.A. § 1395ff(b)(3) (1987)). The Act provides that administrative law judges may not review national coverage determinations in administrative appeals. It also limits judicial review by providing that national coverage determinations may not be held unlawful on the grounds of violation of the APA or lack of opportunity for public comment, and further provides that reviewing courts cannot overturn a denial based on coverage determinations without first remanding to HHS for supplementation of the record.

In Recommendation 86-5, the Conference recommended that HHS "introduce more openness and regularity" into these important determinations through "(1) [d]evelopment of published decisional criteria; (2) providing for notice and inviting comments in such cases, both in HCFA's decisionmaking process and in the process by which [OHTA] supplies recommendations to HCFA; and (3) providing for internal administrative review or reconsideration of such decisions." The Conference commends the recent HCFA notice and request for comments on its procedures as a good first step, but urges that further steps be taken to open up the decisional criteria and procedure to public participation and also urges Congress to consider modifying the statutory limitations on the review of the reasonableness and the procedural fairness of such national coverage determinations.

RECOMMENDATION

1. Publication of Procedures and Criteria Through Rulemaking

The Health Care Financing Administration (HCFA) should continue its recent steps toward describing and seeking comments upon the procedures it uses for making national coverage determinations in the Medicare program. HCFA should follow its recent informational notice with a notice-and-comment rulemaking proceeding setting forth the procedures as well as all decisional criteria for making national coverage determinations.

2. Elements of the National Coverage Determination Process

HCFA's proposed and final rule on national coverage determinations procedures and criteria should:

(a) specify the procedure by which HCFA selects coverage questions that will be considered in this process;

(b) identify and describe what categories of coverage issues will be left to the decision of Medicare contractors and HCFA regional offices; and address the extent to which, and the manner in which, significant coverage determinations made by contractors and regional offices can be identified and disseminated more widely;

(c) provide for the opportunity for public comment prior to promulgation (or if that is infeasible, an opportunity for comment after adoption)[2] of all national coverage policies whether or not the determination is referred to the HCFA Physicians Panel or to the Office of Health Technology Assessment;

(d) establish internal management controls to facilitate the timely processing of requests from Medicare contractors and petitions filed by beneficiaries, providers and other affected persons for initiation of a national coverage determination;[3]

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[2] The agency should then re-evaluate the policy after receiving comments. See ACUS Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 1 C.F.R. § 305.76-5.

[3] See ACUS Recommendation 86-6, *Petitions for Rulemaking*, ¶ 2(d), 1 C.F.R. § 305.86-6 (2)(d).

(e) develop techniques to encourage the HCFA Physicians Panel, the Office of Health Technology Assessment, and the Public Health Service to respond expeditiously to referrals; and

(f) identify all publications in which coverage policy will be published, and the method by which those publications will be made reasonably accessible to beneficiaries and other affected groups.

3. Use of Negotiated Rulemaking

In addition to providing for a national coverage decisionmaking process that accords beneficiaries, providers, equipment manufacturers and other interested parties an opportunity to have input into the formulation of specific national coverage determinations, HCFA should in appropriate cases also consider use of elements of a negotiated rulemaking procedure.[4]

4. Modification of Recent Legislative Restrictions on Administrative and Judicial Review

Congress should reconsider and, at minimum, clarify its intent[5] with regard to the recent restrictions it placed upon administrative and judicial review of national coverage determinations. In so doing, Congress should:

(a) consider whether to clarify the restriction against administrative law judge review of national coverage determinations [42 U.S.C.A. § 1395ff(b)(3)(A)] by (i) making clear that administrative law judges may review the application of such determinations to claimants and (ii) specifying that this limitation only applies to those national coverage determinations that are properly published and indexed, and that have been issued after an adequate opportunity for public comment.

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[4] See ACUS Recommendations 82-4 and 85-5, *Procedures for Negotiating Proposed Regulations*, 1 C.F.R. §§ 305.82-4, 85-5.

[5] In particular, Congress should, for the purposes of these restrictions, clarify its definition of "national coverage determination" and explain whether or not policies other than those concerning medical procedures and technologies and published in the Federal Register or Medicare Coverage Issues Manual are included.

(b) Consider repealing 42 U.S.C.A. § 1395ff(b)(3)(B), which restricts judicial review of procedures used in promulgating national coverage determinations.

(c) eliminate the provision [42 U.S.C.A. § 1395ff(b)(3)(C)] that limits reviewing courts' ability to review the validity of a national coverage determination applied in a particular case without first remanding the case to the agency for supplementation of the record.

RECOMMENDATION 87-9: DISPUTE PROCEDURES IN FEDERAL DEBT COLLECTION

The Debt Collection Act of 1982 (DCA)[1] was passed in response to concern over the vast amount of delinquent debt owed to the federal government and the haphazard collection record of many agencies. While Congress appears to have been concerned mainly with various mass loan and loan guarantee programs, most conspicuously the student loan programs, the effects of the Act extend well beyond such programs. The Act included about a dozen provisions designed to facilitate collection, in many instances by removing obstacles created by other federal statutes and case law. It also contained provisions authorizing the use of collection agencies,[2] charging of interest and penalty fees, reporting of delinquent debtors to credit bureaus, and use of IRS information to locate debtors.

While the purpose of the DCA was to enhance collection efforts, Congress was also concerned about the due process rights of debtors against whom the government was to take action. In adopting provisions for collection by offset against salaries and other money owed by the federal government, Congress provided for pre-offset opportunities for debtors to contest the relevant debts. Agencies implementing the offset authority under the DCA have used advantageously the latitude afforded under the DCA to develop a range of procedures. The Act provides two basic forms of debt collection by offset--"salary" offset and "administrative" offset--with differing procedures for each. A proceeding with an independent decisionmaker and adversary factfinding has been required in most salary offsets, and by a few agencies elsewhere. A range of less formal models, in which collection offices simply reconsider their decisions based on debtor-supplied data and other available information, has been employed in administrative offsets, i.e., those not involving the salaries of government employees.

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[1] 5 U.S.C. §§ 552a(b) and (m), 5514; 18 U.S.C. 2415(i); 31 U.S.C. §§ 3701, 3711(f), 3716-3719; Pub. L. No. 97-365.

[2] The Act was later amended to authorize, on an experimental basis, contracting with private attorneys to bring collection actions.

The framework for offset dispute resolution established by the DCA, Federal Claims Collection Standards (issued jointly by the General Accounting Office and Department of Justice), and the Office of Personnel Management's Pay Administration Standards make possible reasonably adequate evaluation of disputes without seriously impeding collection of general government debts. No major changes are needed. However, the procedural requirements of the DCA and the OPM Standards are overly burdensome when applied to routine pay adjustments. Moreover, some advice to agencies on implementing their dispute processes, reducing uncertainty over the relationship of the DCA to other statutes (e.g., the Contract Disputes Act) affecting government claims, and some other issues raised by the DCA's attempt to integrate due process with effective debt collection, may be useful as agencies make greater use of their authority to collect debts.

RECOMMENDATION

1. AGENCY PROCEDURES UNDER THE DEBT COLLECTION ACT

a. In connection with salary offsets, the General Accounting Office and Department of Justice should amend the Federal Claims Collection Standards[3] and the Office of Personnel Management should amend the Pay Administration Standards[4] so as to reduce the formality of procedures for handling routine adjustments of pay and travel allowances. Informal forms of review, including review on a "class" basis where a single error has a broad effect, should suffice in most cases involving computer errors, simple miscalculations, and similar kinds of mistakes or adjustments.

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[3] 4 CFR Parts 101-105

[4] 5 CFR §550.1101-.1106

b. In connection with administrative offset, informal types of intra-agency review procedures appear consistent with the purposes of the DCA, and can provide a satisfactory balance between protecting debtors and assuring effective collection.[5] However, agencies should ensure, where possible, that the reviewer does not participate in the initial claims determination, particularly where a dispute involves substantive issues that go beyond allegations of mechanical or other simple kinds of error.

c. Procedures with an independent decisionmaker and adversarial factfinding may occasionally be desirable in administrative offset cases where a debtor raises relatively complex legal or factual issues or where assessments of credibility are required. However, these procedures may be needlessly burdensome for agencies even in some procedurally complex situations, such as where other proceedings with respect to the claim may be occurring and preservation of the government's flexibility is necessary. Taking into account these factors, agencies should consider whether to make use of such procedures even though apparently not required to do so by the DCA.

d. Agencies should take steps to enhance the awareness of, and access to, offset dispute procedures by debtors with limited ability to present a case in writing or otherwise cope with offset procedures. These steps may appropriately be confined to measures that are inexpensive and do not significantly interfere with efficient collection activity. Examples might include follow-up telephone calls to debtors with vague or inadequate written submissions, review of agency records to see if they support debtor allegations, and use of telephone hearings. In connection with salary offset disputes, these steps should be taken by independent hearing officials (or persons associated with them) as well as by collection staff. Experience should be monitored to see if measures to enhance accessibility of the dispute process in fact result in more debtors asserting meritorious defenses.

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[5] This recommendation should not be read as detracting from the procedures for resolving disputes relating to federal grants that were recommended by the Conference in Recommendation 82-2. 1 CFR § 305.82-2. Where administrative offset issues are addressed at the same time as post-award grant disputes, the proceedings should include a notice, an impartial decisionmaker, an opportunity to present significant evidence and argument, and a written decision, as called for in Recommendation 82-2.

e. Some techniques that have been employed and should be considered to keep offset procedures expeditious and efficient are:

> (i) Adoption of objective criteria to assist in making decisions respecting hardship and other potentially nebulous matters; and
>
> (ii) Avoiding the need for oral hearings on issues of credibility by treating debtors' factual allegations as proven where
>
> > (a) circumstances do not give rise to significant doubts as to reliability and
> >
> > (b) either the amount in dispute is small or the issue of credibility is not critical to the disputed facts.

2. CLARIFYING THE ACT'S RELATION TO OFFSETS IN GOVERNMENT CONTRACTS

a. Congress should clarify the applicability of the DCA provision on administrative offset (31 U.S.C. § 3716) to make clear that government acquisition contracts are not covered, but that the government retains the right of offset to collect debts in such cases. At the same time, Congress should ensure that, under relevant agency procedures, before a contracting officer's decision can serve as the basis for offset under any other authority,

(i) The contractor receives notice of the proposed government claims and the basis for them and an informal opportunity to present its position, and

(ii) the decision is informally reviewed by an agency official not directly connected with administering the contract.

b. The withholding of funds in connection with a single contract, where final payment has not occurred, should continue to be governed by existing law.

RECOMMENDATION 87-10: REGULATION BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

This is the second of two recommendations adopted by the Administrative Conference this year on Occupational Safety and Health Administration (OSHA) regulation. In its first recommendation,[1] the Conference recommended that OSHA make specific changes in its management of rulemaking and its process for establishing regulatory priorities. At that time, the Conference accepted OSHA's request that it continue to study possible broader changes to its regulatory process, including alternatives to the traditional hazard-by-hazard[2] regulation.

Having completed this study, the Conference recommends more extensive procedural changes to assist OSHA in fulfilling its statutory mandate of assuring adequate safeguards for American workers. OSHA has promulgated a small number of safety and health standards each year using the traditional hazard-by-hazard approach.[3] But the task before the agency is overwhelming existing processes. OSHA is responsible for regulating dangerous chemicals included in the tens of thousands of chemicals in the nation's workplaces, to which approximately one thousand new chemicals are added each year. OSHA also is charged with enforcing safety standards in American workplaces.

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[1] ACUS Recommendation 87-1, Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration, 52 F.R. 23629 (1987).

[2] As used in this recommendation, the term "hazard" without further modification refers to both safety hazards and health hazards (*e.g.*, exposure to toxic substances).

[3] During its first sixteen years, OSHA promulgated eighteen new health standards (setting permissible exposure limitations for twenty-three substances) and twenty-six safety standards.

The Conference, therefore, recommends that OSHA undertake rulemaking to develop generic or class standards, including updating the 1971 national consensus standards, where appropriate. In addition, the Conference recommends a regulatory planning process and use of other procedures to supplement its traditional rulemaking process. It is important to add, however, that the Conference has found no alternative regulatory approach that is always appropriate or better than the traditional regulation. Rather, this recommendation identifies factors or conditions that favor the use of the various alternative regulatory approaches.

One uncertainty clouding OSHA's use of generic or class rulemaking is whether OSHA can obtain the information it needs to meet the burden of proof required by the Occupational Safety and Health Act ("Act") for safety and health standards. As interpreted by the courts, OSHA is required to show that a hazard poses a "significant risk" to workers and, if so, to set the standard at a level that assures "to the extent feasible" that no employee will suffer "material impairment of health or functional capacity." If OSHA is unable to obtain the information needed for its risk and feasibility determinations, the use of generic rulemaking, as well as other internal reforms, is not likely to lead to a more efficient regulatory process.

Experience with generic or class rulemaking may show that statutory changes are required to enable OSHA to adopt this procedure. The Conference, therefore, recommends amendments of the Occupational Safety and Health Act that Congress should consider if OSHA's administrative efforts to promulgate generic standards are not successful. One recommendation is that Congress provide an expedited procedure for updating the 1971 Table Z national consensus standards. The Conference also recommends that Congress reconsider the Act's regulatory standard in light of its judicial construction and agency experience. Specifically, Congress should consider giving OSHA greater flexibility in fashioning remedies to correspond to the level of workplace risks. Congress, for example, could allow OSHA to regulate some hazards to a level of "best available technology," as the Environmental Protection Agency is allowed to do under various statutes. The Conference also recommends that the Act's rigid statutory deadlines and detailed restrictions on advisory committees be removed. A final recommendation is that Congress replace the Act's "substantial evidence" judicial review standard with a standard that reflects the nature of rulemaking decisions.

RECOMMENDATION

1. Updating the 1971 Consensus Standards. The Occupational Safety and Health Administration, as an interim step, should continue to update the Table Z national consensus standards adopted in 1971 if updating can be accomplished by an expedited rulemaking procedure (*e.g.*, including more concise preambles) appropriate to the nature of the revised Table. OSHA should update the 1971 standards on a generic basis (*i.e.*, include multiple standards in one proceeding) when consensus recommendations are available, which are generally accepted by employers and workers in the affected industries, and when the new standards can be evaluated on the basis of risk and feasibility information reasonably available to the agency. This interim step should not interfere with OSHA's continuing responsibility to promulgate and modify safety and health standards.

2. Rulemaking to Develop Generic or Class Standards. OSHA should expand its use of generic or class standards regulating multiple health and safety hazards where appropriate and consistent with its legal mandate.

a. *Industry-wide standards.* OSHA should consider the following criteria when deciding if industry-wide generic standards will be more efficient and effective than hazard-by-hazard regulation: (1) whether hazards are in an industry that can be discretely defined, (2) whether most of the hazards to be regulated are unique to the industry to be regulated, (3) whether the hazards in the industry are relatively static over time, and (4) whether industry-wide rulemaking will impose lower aggregate compliance costs on the regulated industry than rulemaking on a hazard-by-hazard basis.

b. *Multi-hazard standards.* OSHA should consider adopting multi-hazard standards whenever scientific knowledge and policy judgment make it possible to use the same or a similar risk assessment for a group of included hazards and the feasibility analysis can be simplified or expedited because standard abatement techniques are available.

c. *Generic work-practice standards.* OSHA should consider adopting work-practice standards (*e.g.*, training, worker protective devices, and engineering controls) applicable to multiple industries when the following factors are present: (1) a similar hazard exists in the industries that can be regulated by one rule, (2) the same or a similar work-practice requirement would be effective in all such industries, and (3) generic risk and feasibility findings are appropriate.

3. Regulatory Alternatives and Procedures. In addition to generic or class rulemaking, OSHA should adopt the following rulemaking alternatives and procedures as appropriate:

a. *Performance standards.* OSHA should generally use performance standards (*i.e.*, standards that prescribe the regulatory result to be achieved) whenever they will provide equivalent protection as that provided by design standards (*i.e.*, standards that prescribe a specific technology or precise procedure for compliance). In deciding which type of standard to employ, OSHA also should consider whether the standard can be readily understood and monitored and whether it may lower industry compliance costs.

b. *Information disclosure.* OSHA should continue to approve information disclosure requirements as a complement to regulatory standards.

c. *Negotiated rulemaking.* OSHA should continue to experiment with negotiated rulemaking procedures;[4] in so doing it should develop methods (such as specific deadlines for termination of any negotiation) to assure that the negotiated rulemaking procedure is discontinued in a timely manner if it is not working.

d. *Advisory committees.* OSHA should reactivate rulemaking advisory committees for difficult scientific and technological questions. The scientific orientation in such committees should be assured by including a high proportion of independent and government scientists on committees. In addition, questions assigned to such committees should be limited so that current statutory deadlines can be met. (*See*

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[4] The Conference has previously provided guidance to agencies on the use of negotiated rulemaking, *see* ACUS Recommendations 82-4 and 85-5, Procedures for Negotiating Proposed Regulations, 1 CFR §§ 305.82-4, 85-5 (1987).

also section 5.c. below.) OSHA also should require its advisory committees to submit written reports which include the committee's evaluation of relevant data.

e. *Advance notice of proposed rulemaking.* OSHA should not routinely use advance notices of proposed rulemaking as an information-gathering technique; it should use an advance notice when information that is not available through other vehicles is likely to be forthcoming in response to such notice.

f. *Interagency coordination.* OSHA should continue to cooperate with other health and safety agencies and OMB to coordinate where possible the testing, evaluation, and regulation of potential health hazards.[5]

4. Developing a Regulatory Plan. OSHA should periodically develop and review regulatory plans which specify how the agency intends to regulate hazards on its priority lists, including identification of potential candidates for generic rulemaking, negotiated rulemaking, use of advisory committees and other regulatory approaches or techniques. To avoid duplication, OSHA should coordinate its regulatory plans with any submission required by the Office of Management and Budget.

a. *Regulatory planning committee.* OSHA should assign the initial responsibility for developing regulatory plans to an internal regulatory planning committee that includes representatives from all appropriate department and agency offices.

b. *Public availability.* OSHA should make a synopsis of the results of regulatory planning committee meetings available to the public after the Assistant Secretary has had an opportunity to review any proposed committee recommendations. In addition, OSHA should periodically provide an opportunity for public comment on its regulatory plan.

5. Statutory Change. OSHA should include in its periodic reports to Congress the status of its implementation of the

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[5] The need for interagency coordination of federal regulation of cancer-causing chemicals is addressed in Part II of ACUS Recommendation 82-5, 1 CFR § 305.82-5 (1987).

administrative changes recommended in paragraphs 1 through 4 above. If statutory impediments or judicial decisions inhibit efficient and effective regulation, Congress should consider amendments of the Occupational Safety and Health Act, including the following:

a. *Consensus standards update.* Congress should amend the Act to provide an expedited procedure for the generic updating of the permissible exposure levels in Table Z, incorporated into OSHA standards at 29 CFR § 1910.1000. This procedure, while not including all the steps specified in 29 U.S.C. § 655(b) as construed by the courts, should afford an opportunity for public comment.

b. *Regulatory standard.* Congress should amend the Act to give OSHA greater flexibility in regulating workplace hazards. Following its experience in environmental regulation,[6] Congress should consider establishing a classification scheme that would vary OSHA's burden of justification for safety and health standards to correspond to the degree of risk posed by a hazard and the level of control to be required by the OSHA standard.

c. *Rulemaking deadlines.* Congress should amend the Act to replace the existing statutory deadlines for various stages of rulemaking with a provision requiring OSHA to set timetables or deadlines for each rulemaking proceeding.[7]

d. *Advisory committees.* Congress should amend 29 U.S.C. § 656(b) to replace the detailed restrictions on standard-setting advisory committee membership with a general provision authorizing use of advisory committees subject only to the Federal Advisory Committee Act, 5 U.S.C. App.

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[6] Under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982), and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), Congress has authorized different classes of regulation, specified an initial designation, established a lower burden of proof for regulation that is less strict, and has indicated that the agency is to receive deference for its final choice of which class of regulation to apply. A similar approach is used for Food and Drug Administration regulation under the Medical Devices Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 360c-360k (1982).

[7] *See* ACUS Recommendation 78-3, Time Limits on Agency Actions, 1 CFR § 305.78-3 (1987).

e. *Judicial review standard.* Congress should amend the standard of judicial review for OSHA safety and health standards, 29 U.S.C. § 655(f), so that agency policy judgments are subject to the traditional standard of "arbitrariness" and the factual premises on which they are based are subject to a standard of "substantial support in the administrative record viewed as a whole."[8]

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[8] The recommended standard follows ACUS Recommendation 74-4, 1 CFR § 305.74-4, ¶¶ 3, 4 (1987). It is also consistent with the Restatement of the Scope of Review Doctrine adopted by the Administrative Law Section of the American Bar Association.

RECOMMENDATION 87-11:

ALTERNATIVES FOR RESOLVING GOVERNMENT CONTRACT DISPUTES

Government procurement is a major component of federal spending. It now comprises an important part of the nation's economy. The recent expansion of government contracting has been matched, perhaps exceeded, by the rise in disputes between agencies and contractors. Increasingly, management problems are handed over to lawyers and accountants to be resolved contentiously by criteria that are often only marginally relevant. Causal factors include increased regulatory requirements; reduced authority of agency contracting officers; a greater willingness among contractors to resort to litigation; an expanding government contracts bar; broadened notions of due process; enhanced congressional oversight that can discourage settlement; and the establishment (or expansion) of offices of inspector general and intra-agency audit offices.

Most knowledgeable government officials, contractors and attorneys agree that government contract appeals have become too onerous, too expensive and too time- consuming. Despite Congress' goals in enacting the Contract Disputes Act of 1978 ("CDA") to provide an expeditious alternative to court litigation and to encourage negotiated settlements, most appeals are not now resolved either promptly or inexpensively. Agency boards of contract appeals ("BCAs"), originally intended to be alternatives to courts, have become "judicialized," with depositions, discovery and lengthy opinions common.

The system established by the CDA[1] begins with the contracting officer ("CO"), an agency official whose function is to enter into and administer government contracts. Any claim arising out of a contract is to be presented to the CO. The CO has a dual role: to represent the government as a party to the contract, but also to make initial decisions on claims subject to certain procedural safeguards. If the dispute is not amicably resolved, the CDA requires the CO to issue a brief written decision stating his or her reasons. A contractor dissatisfied with a CO's decision may appeal either to an agency BCA or directly to the U.S. Claims Court. The proceedings become considerably more formal at this stage. While agency boards and their rules are hardly uniform, they typically involve written notice of appeal and complaint, discovery, depositions, subpoenas, hearings that result in transcripts, and board decisions signed by three-member panels. "Accelerated" procedures are available for claims under $50,000, and a more streamlined "expedited" process for claims under $10,000.

A variety of remedies have been prescribed for the growing cost, delay, and other problems encountered in federal contract disputes. They range from marginal revisions of the boards (e.g., enlargement of BCA resources), to increased professionalization of COs, to structural changes in the ways agencies do business. While a number of these proposals have merit, the Conference is focusing herein only on the cluster of methods that have come to be known as alternative means of dispute resolution ("ADR").[2] These methods are consistent with the CDA's goals, and have proven efficient and fair. They serve to involve decisionmakers, rather than their representatives, in the conflict resolution process. ADR methods have regularly aided private parties to resolve disputes similar to those decided by BCAs.

Several ADR methods are particularly appropriate to resolving many government contract claims, and a few agencies have begun to experiment successfully with them. The Conference urges all major contracting agencies, and persons who deal with them, to explore seriously the potential uses for ADR and to begin creating an atmosphere in which these methods can be readily employed.[3] This recommendation offers advice on the application of commonly used ADR methods to post-award contract disputes before agency boards of contract appeals.

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[1] 41 U.S. Code §§ 601-613; 5 U.S.C. § 5108 (c)(3); 28 U.S.C. §§ 1346(a)(2), 149(a)(2), 2401(a), 2414, 2510, 2517; 31 U.S.C. § 1304(a)(3)(C) (1982); enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383.

[2] These include arbitration, factfinding, minitrial, mediation, facilitation, convening, conciliation, and negotiation.

RECOMMENDATION

1. AGENCIES' ADR POLICIES AND PRACTICES

a. Congress should amend the Contract Disputes Act (1) to make indisputably clear that the contractor and the government may agree to use arbitration[4] or any other mutually agreeable ADR procedures for resolving claims relating to agency contracts and (2) to encourage COs to make all reasonable efforts to resolve a claim or dispute consensually, either prior to issuance of a CO decision or subsequently.

b. The President should promulgate an Executive Order that encourages voluntary use of ADR procedures to resolve contract disputes at the CO and BCA levels.

c. The Office of Federal Procurement Policy should issue a policy statement, and the Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council should amend the Federal Acquisition Regulation,[5] to encourage COs, before issuing a decision likely to be unacceptable to a claimant, to recommend to the parties and their representatives that they seek to explore the use of ADR to resolve their differences. The policy statement and FAR should also encourage agencies to adopt policies or rules concerning ADR, as set forth below.

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[3] The Conference has repeatedly recommended that agencies employ ADR. Recommendation 86-3 calls on agencies to make greater use of mediation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness accompanying many agency decisions. *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR § 305.86-3. The Conference has previously called for using mediation, negotiations, informal conferences and similar innovations to decide certain kinds of disputes more effectively. E.g., *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4, 85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4; *Resolving Disputes under Federal Grant Programs*, 1 CFR § 305.82-2.

[4] Such arbitration authority should be consistent with the procedures and safeguards set forth in Conference Recommendations 86-3, *id*, and 87-5, *Assuring the Fairness and Acceptability of Arbitration in Federal Programs*, 1 CFR § 305.87-5.

[5] 48 CFR Part 7

d. Agencies should adopt policies encouraging voluntary use of ADR in contract disputes. The policies should place the responsibility for implementing ADR with contracting officers, government counsel, and BCA judges. These policies should make clear that superior agency officials will support reasonable settlements reached by means of properly selected ADR methods. The policy should also provide for systematic review of all cases for susceptibility to ADR, specify who has authority to approve the selection of a case for ADR, and set forth guidance on documenting the negotiation processes or justifying settlements. Agencies should also consider, as a matter of general policy, offering certain forms of ADR to contractors in specified kinds of disputes (e.g., those involving less than a stated maximum amount).

e. Agencies should adopt regulations that (1) authorize agency officers to make use of ADR in contract disputes; (2) make provisions for automatically alerting the parties, both at the CO level and as soon as an appeal is filed, that one or more ADR methods is available; (3) authorize BCA judges to encourage ADR use and to require the attendance, at any conference held for the purposes of proposing or implementing ADR, of at least one representative of each party who has authority to negotiate concerning the resolution of all issues in controversy; (4) briefly describe the alternative procedures; (5) authorize the parties to agree to vary any procedural rule in their case; and (6) insure confidentiality of communications made during use of ADR methods.

f. Agency boards of contract appeals should:

(1) Routinely include in docketing notices an announcement indicating the availability of ADR, describing the available methods, and telling how interested persons can follow up to explore potential ADR use in their cases.

(2) Amend their procedural rules to provide explicitly for conferences to consider the possible use of ADR in each case to help dispose of any or all issues in dispute.

g. Presiding and chief judges at BCAs should regularly review their dockets and suggest use of a settlement judge, mediation, minitrial, or other ADR methods whenever appropriate.

2. EMPLOYING ALTERNATIVES IN CONTRACT DISPUTES

a. Finding Neutrals[6]

(1) To facilitate the parties' choice of appropriate neutrals, the Administrative Conference, in consultation with the Federal Mediation and Conciliation Service and other knowledgeable groups, should establish a central roster of minitrial advisors and other neutrals available to help resolve government contract disputes. Use of the list, however, should not be mandatory. The list should include, at a minimum:

(a) All persons who have experience as neutral advisors in government contracts minitrials;

(b) Any BCA judges and administrative law judges who wish to serve as neutral advisors for disputes within their own agency, another agency, or both. (Some safeguards to ensure interagency reciprocity and to assure no other involvement with the dispute may be necessary); and

(c) Any retired federal or state court judges, BCA judges, and administrative law judges who are interested.

(2) Each BCA should take steps to make available its judges to serve as settlement judges, minitrial advisors, or other neutrals to help resolve disputes before other agencies' BCAs.

b. Minitrials

(1) Agencies should develop and distribute minitrial guidelines that include sections dealing with criteria for identifying appropriate cases; contents of minitrial agreements; rules as to any discovery; roles of the participants, including any neutral; authority of the principals; exchange of position papers, audit reports, quantum submissions, and other documents and exhibits; procedure and format of the hearing; possible time limit on the negotiations; fees and expenses; and procedures for

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[6] In Recommendation 86-8, *Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution*, 1 CFR § 305.86-8, the Conference addressed issues involving neutrals' availability, qualifications and acquisition. The present Recommendation seeks to elaborate on 86-8 in the specific context of contract appeals.

ensuring the confidentiality of the proceedings. The guidelines, which should be used only as procedural suggestions, should also give each party the right to terminate the minitrial procedure at any time for any reason. Any guidelines acceptable to the parties, together with other provisions relevant to the resolution of the dispute, should be incorporated.

(2) In selecting principals to represent the agency in a minitrial, agencies should ensure that principals in the minitrial agreement:

(a) Are of sufficient rank in the agency to negotiate, and successfully defend, a binding settlement.

(b) Have authority to bind their organizations in the dispute at hand, or at least to make recommendations that will be accorded substantial weight.

(c) Ideally have little prior involvement with the case so as to be able to evaluate objectively the issues and the agency's potential liability.

(d) Have enough background to grasp the main issues quickly.

(e) Not be at such a high level that his or her involvement will detract in a major way from the agency's operations.

Agencies should meet these concerns by, among other things, tailoring the rank of the principal to suit the magnitude of the case and by encouraging ADR use earlier in the case (e.g., the CO level).

(3) Agencies should take steps to make participation as a principal an attractive career step and encourage or provide training in negotiation and mediation skills among groups of potential principals.

(4) Principals should generally have access to technical, legal, accounting, or other advice from agency staff during the hearings and negotiations so as to produce a more well-informed, defensible resolution, enhance accountability, and build intra-organizational support for any settlement. Unless secrecy is especially important, it will ordinarily be unwise to sequester most minitrial witnesses, particularly experts, since a looser format may

encourage dialogs or exchanges that can help focus issues and sometimes promote agreement.

(5) Once the principals have had a chance to assess the strengths and weaknesses of both sides' positions, their negotiations should take place promptly and should be final and binding. The responsible principals ordinarily should have authority to resolve all issues before them without seeking further agency approval following the close of negotiations.

(6) While the "neutral advisor" who helps the principals at a minitrial assess the merits of a case can be quite useful, the parties should consider foregoing such aid in cases where the principals already have a good working relationship, where issues are simple or amounts small, or, conversely, where complex technical issues predominate to such an extent that it would be futile to waste time trying to educate a neutral. Neutrals probably will also be less needed where the minitrial occurs early on--for instance, at the CO level--when positions may be less rigid, formal procedures not yet invoked, and fewer parts of the agency involved. In those cases, the CO might well serve as a sort of presider-principal.

(7) A neutral advisor's role should be defined by the parties (at least tentatively) prior to the hearing by the principals. Any shift during the proceeding should be only with the concurrence of the principals.

(8) Where minitrial neutral advisors are used, the parties should consider whether to seek their assistance in any of the following ways:

(a) Presiding over the hearing;

(b) Serving as a source of information, responding to technical legal questions, or offering insights and observations on issues in controversy;

(c) Posing questions at the hearing so as to ensure that the basic facts are ascertained;

(d) Suggesting novel approaches to presenting relevant information;

(e) Working actively during the principals' negotiation sessions to aid settlement, as by advising each side on the strengths and weaknesses of its case, relevant legal principles, and how the law might apply to the facts established;

(f) Serving as a mediator;

(g) Suggesting that certain advisors or staff members be brought into the negotiations or briefed; or

(h) Providing a written, nonbinding opinion to the principals, or helping them prepare a justification for the settlement agreed on.

c. Mediation

Agency boards of contract appeals should establish mediation programs in which parties can be required to attend an initial session with a mediator. The boards should require parties to be represented at the session by a person with authority to negotiate concerning the resolution of all issues in controversy. The boards may wish to exclude from these programs certain kinds of cases. Counsel should be required, where appropriate, to provide specified documents to the mediator, and to prepare short position papers.

d. Settlement Judges

(1) Agency boards of contract appeals should institute a procedure under which a settlement judge -- not the presiding judge in the case -- may be appointed to preside over settlement conferences or negotiations, assess settlement potential, and work with the parties to explore possible settlement of a dispute. The settlement judge device should be capable of being invoked at the discretion of the chief judge on his or her own motion or that of any participant or the presiding judge. An order appointing a settlement judge should specify whether, and to what extent, the proceeding is suspended during the settlement negotiations and may define the scope of any negotiations to specified issues. The order may also expressly limit the period for settlement negotiations and require a brief report from the settlement judge. Each party should have the right to refuse to use the process, or to withdraw at any time.

(2) The settlement judge should be deemed to have the power to suggest privately what concessions a party

should consider, to confer privately as to the reasonableness of each party's case or settlement position, and to require that representatives with authority to negotiate concerning resolution of all issues in controversy be present at the settlement conference. The settlement judge shall be prohibited from discussing the merits of a case with any other BCA judge or other person, and shall not be called as a witness in the case.

3. DOCUMENTATION AND OVERSIGHT

a. Agencies should offer guidance to their personnel on the degree of documentation that is appropriate to justify settlements that have been reached via ADR; the guidance should emphasize the needs for flexibility without undermining accountability. For instance, the guidance could require the principal representing the agency in negotiations or his advisor to set down cost and other factors taken into consideration, the principal elements of the negotiation, likelihood of success at trial, and other significant facts or considerations justifying any significant differences between prenegotiation objectives and negotiated result; in short, a reflection of the thought process or rationale of officials who agreed to the settlement. This documentation should not exceed what would ordinarily be used to justify negotiated settlements of contract disputes, and should generally be written after the fact so that ongoing negotiations are not jeopardized or delayed. A neutral advisor who has helped the parties resolve a potentially serious case may be asked to help draw up the justification memo, or offer a brief advisory decision.

b. Since the effectiveness of expanded reliance on ADR will depend in part on the degree of support or opposition from congressional committees and offices of inspector general, agencies should seek to document, and furnish periodically to relevant committees and oversight offices information on, the relative costs and benefits of ADR methods in cases where they have been used. Documentation should include case results, estimated savings, identities of principals and advisors, and nature of processes used.

4. TRAINING AND OUTREACH

a. Agencies should give priority attention to offering training in negotiation and other ADR skills to BCA judges, government attorneys, COs, and others involved in contract appeals. Training courses or seminars should be developed by agencies jointly or in cooperation with the Administrative Conference, Federal Mediation and Conciliation Service, Board of Contract Appeals Judges Association, American Bar Association, or other professional organizations. Agencies should also work with other interested groups to sponsor similar programs or outreach sessions for contractors and their representatives, and seek to incorporate materials on ADR into the training curricula for COs and project managers.

b. Agencies should designate an employee to serve as an ADR specialist in connection with contract disputes, and should consider retaining the services of a trained mediator or similar professional to review cases for susceptibility to ADR, advise BCA judges, and mediate selected cases.

RECOMMENDATION 87-12:

ADJUDICATION PRACTICES AND PROCEDURES OF THE FEDERAL BANK REGULATORY AGENCIES

The five federal agencies that regulate the activities of depository institutions[1] have broad statutory enforcement authority, including the power to issue cease-and-desist orders, impose civil money penalties, or order the suspension and removal of officers. Such enforcement actions ordinarily allow the target of the proposed sanction to request a formal APA hearing before an administrative law judge.

In recent years, enforcement actions taken by the bank regulatory agencies have increased markedly, although the preponderance of these actions are taken without a formal hearing -- based on consent agreements or waivers of formal hearing. The current level of formal hearings has, however, reached the point where attention should be paid to the procedures and practices of the bank regulatory agencies in this regard.

Three basic concerns have emerged from an evaluation of the formal hearing procedures of the bank regulatory agencies, which may be summarized as the need for: (1) consistency and greater uniformity in the agencies' implementation of shared statutory responsibilities, (2) greater accessibility of agency decisions and the basis for decisions, and (3) more efficient use of administrative law judges.

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[1] The term "depository institutions" refers to commercial banks, savings banks and savings and loan associations, and credit unions. The five agencies are the Office of the Comptroller of the Currency (in the Department of the Treasury), the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board (including the Federal Savings and Loan Insurance Corporation), and the National Credit Union Administration. In the aggregate they will be referred to as the "bank regulatory agencies."

Although the Conference study did not specifically address the need for change in the division of regulatory responsibilities among the five agencies, it did conclude that the interpretation of identical or similar regulatory authorities does not appear to be inconsistent. By contrast, the formal hearing procedures of the agencies vary significantly, both in their specific provisions and in their level of detail. Moreover, all of the regulations are lacking in detail on rules concerning prehearing practice, discovery and evidence. Given the similar statutory bases for these enforcement actions, the five agencies jointly should be able to develop substantially similar rules of procedure and practice for formal enforcement proceedings.

There is currently limited publication or public dissemination of the bank regulatory agencies' enforcement decisions. This hinders counsel in advising and representing clients and makes it difficult for administrative law judges (who currently are all on loan from other agencies) to apply the complicated statutes and regulations that are involved. This situation would be remedied by improved availability or publication of appropriately redacted agency decisions. Such publication would heighten public awareness of enforcement actions which now are described only in aggregate data published in annual reports. This may be especially beneficial because the agencies have not regularly supplemented or clarified their enforcement policies through interpretive rules or policy statements.

None of the five agencies employs administrative law judges (ALJs) to hear enforcement cases. Rather, they rely exclusively on the interagency ALJ loan program administered by the Office of Personnel Management (OPM) to furnish them with needed ALJs. OPM has attempted to accommodate agency concerns by providing lengthier loan periods and repeat loans. Nevertheless, the system seems to produce needless discontinuity and inefficiency. To improve this situation, the bank regulatory agencies should, in consultation with OPM, consider the advisability of an arrangement by which a pool of administrative law judges could handle all bank regulatory agencies' formal adjudications--subject to any agency's decision to have its own ALJs, should the caseload warrant. If so, ways should be explored to effect such an arrangement. For example, one or more full-time judges could be hired by one of the agencies, which would then serve as the lending agency for the others.

Finally, the Conference urges the agencies to explore whether a pre-complaint procedure (modeled on that used by the Securities and Exchange Commission) would be appropriate in their individual circumstances and should be established. This would enable targets of enforcement investigations to file a submission to the agency head or other agency official charged with the responsibility to initiate formal enforcement proceedings, before such an action is initiated.

RECOMMENDATION

The bank regulatory agencies should take the following actions to improve their formal adjudicatory processes, with respect to regulatory enforcement actions:

1. Uniform Rules of Procedures. The agencies should develop, so far as feasible, a uniform set of rules of practice and procedure for formal adjudications, including more explicit provisions covering prehearing practice and discovery rules[2] and the receipt of evidence.[3]

2. Availability of Decisions. The agencies should make available through regular publication, or other accessible means of dissemination, the appropriately redacted decisions and accompanying opinions issued in formal enforcement adjudications.

3. Policy Articulation. The agencies should supplement and periodically clarify enforcement policies set forth in adjudicative opinions by regularly articulating their enforcement policies through rules of general applicability (including interpretive rules) and policy statements.

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[2] See ACUS Recommendation 70-4, Discovery in Agency Adjudication, 1 C.F.R. §305.70-4.

[3] See ACUS Recommendation 86-2, Use of the Federal Rules of Evidence in Agency Adjudications, 1 C.F.R. §305.86-2.

4. Administrative Law Judges. The agencies, in consultation with the Office of Personnel Management, should consider the advisability of an arrangement by which a pool of administrative law judges could handle all bank regulatory agencies' enforcement adjudications required to be conducted according to the Administrative Procedure Act, and, if so, should explore ways to develop such an arrangement.

5. Precomplaint Notice. The agencies should explore, in their circumstances, the utility of establishing a formal or informal procedure to allow targets of investigations an opportunity to file a submission with the appropriate agency official before official action is taken to initiate an enforcement proceeding.

STATEMENT 12:
RESOLUTION OF FREEDOM OF INFORMATION ACT DISPUTES

The Administrative Conference sponsored a study of the resolution of disputes arising out of Freedom of Information Act ("FOIA") requests that are not handled to the requester's satisfaction at the agency level. Specifically, the study proposed the establishment of an independent administrative tribunal to resolve these disputes, either in formal hearing proceedings or through informal conciliation. Alternatively, the study suggested the appointment of an ombudsman within the Department of Justice to review and report on agency FOIA decisions, mediate FOIA disputes, and/or provide informal assistance to persons requesting information from agencies under FOIA.

Currently available data do not clearly establish the need for either of these specific mechanisms for handling FOIA disputes. The ability of the administrative tribunal in particular to increase the efficiency or effectiveness of FOIA dispute resolution is doubtful, especially given the moderate FOIA caseload (approximately 500 new federal court filings per year) and the high degree of public confidence in the current system of *de novo* judicial review of agency FOIA decisions.

However, the Conference believes that greater reliance on informal approaches to FOIA dispute resolution could result in more effective handling of some FOIA disputes without resort to court litigation; thus these approaches bear further exploration. Accordingly, the Administrative Conference concludes the following:

1. The Conference does not at this time recommend supplanting or changing the currently available remedy of judicial review in federal district courts for requesters denied information under the Freedom of Information Act. However, the Conference does believe that a number of cases filed each year challenging agency denials of information under the Act could be resolved without litigation. Additionally, some disputes involving agency handling of Freedom of Information Act requests (i.e., issues such as processing delay, adequacy of the agency's records search, or availability of fee waivers as distinct from the outcome of the request on the merits) may arise from misunderstandings that could be quickly cleared up through informal investigation or discussion. Continuing attention should be given to developing mechanisms to simplify and to speed the process of review.

2. The Department of Justice and other agencies handling FOIA requests should explore the voluntary use of informal alternative dispute resolution techniques, such as informal investigation of complaints, mediation or conciliation, and provision of a neutral government official to aid the parties in reaching settlement[1], to avoid unnecessary litigation of Freedom of Information Act disputes, and should use these techniques when appropriate.

3. On a limited basis, the Department of Justice already provides informal assistance to requesters that the Conference believes helps them in resolving Freedom of Information Act disputes. However, this function is not generally known to the public. These services would be valuable to a larger number of people than now receive them, and the Conference encourages the Department of Justice to explore means of making them better known and more generally available.

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[1] *See* ACUS Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution, Paragraph 10.

REPORTS

FOR

RECOMMENDATIONS 87-1 THROUGH 87-7

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-1

OSHA RULEMAKING PROCEDURES*

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EXECUTIVE SUMMARY

Regulatory reform at OSHA has been considered by each successive administration at the agency. This report explains why such reform is so difficult, explores some realistic opportunities for reform, examines the advantages and disadvantages of each, and suggests steps OSHA might take to improve its efficiency and productivity.

I. The Difficult Environment of Regulation

The productivity of health and safety agencies, such as OSHA, is limited by substantive, managerial, legal, and political factors. The necessity to undertake the complex scientific and policy judgments required by Congress and the White House are important substantive constraints. The small size of agency staffs, the difficulty of attracting and retaining good scientists, managers and policy analysts, and the rapid turnover of agency administrators are important managerial constraints. Legal constraints include a public hearing process and other court-imposed procedural and substantive requirements. Finally, political constraints include the necessity of accommodating various interest groups, Congress and the White House as the agency makes difficult moral and philosophical choices.

OSHA shares with other health and safety regulatory agencies the foregoing constraints, but it faces unique additional difficulties that increase their impact. OSHA is not a licensing agency (which would encourage industry cooperation), it often has less accurate risk and feasibility evidence (because industry is not required to supply the necessary information), and it has more difficult priority-setting responsibilities (because it must choose which hazards to regulate from a large agenda). Moreover, although it has as many or more regulatory responsibilities as any other agency, special problems with scientific and administrative resources and management capability limit its ability to meet that challenge. Some of these problems are inherent in the structural organization of OSHA, and the others are caused by the agency. Further, unlike some other agencies, OSHA engages in hybrid rulemaking to promulgate standards, and it bears the burden of proving by "substantial evidence" that regulation is necessary. Finally, OSHA is guaranteed an unusual amount of political controversy because of the long history of antagonism between business and labor.

In light of the previous difficulties, it is remarkable that OSHA has accomplished as much as it has. Nevertheless, it is also clear that much remains to be done. Knowledgeable observers are generally pessimistic that OSHA can effectively fulfill its statutory mandate, and even those who are optimistic are rather guarded in their hopes.

A high degree of caution is certainly appropriate. The problems at any health and safety agency, and especially at OSHA, are complex. Moreover, reform of an ongoing agency is difficult, because it upsets the expectations of both supporters and opponents of agency action. Finally, groups representing labor, management, physicians, other health professions, and public interest organizations perceive the need for change according to their professional orientations. Because each group differs in orientation, OSHA reform is "contested terrain." With these realities in mind, this Report proposes two kinds of reforms--OSHA should establish a better priority setting system, and it should implement new management tools to enhance accountability.

II. Prioritization.

With current resources, OSHA can pursue no more than 15-20 major rulemaking efforts at any given moment, and it can take on only about 2-5 new projects in any single year. There are presently at least nine sources of rulemaking initiatives that vie for OSHA's attention as it attempts to establish a rulemaking agenda: OSHA's own (but largely abandoned) systematic prioritization efforts; worker and consumer group petitions; congressional demands for action; pressure from the White House or OMB; referrals from EPA pursuant to The Toxic Substances Control Act; NIOSH criteria documents; private standard-setting agencies; information collected from the field; and developments in the states and other countries.

Ideally, OSHA should channel all of these sources into its own comprehensive agenda-setting mechanism to establish a realistic set of priorities for the near term. Although OSHA comes close to achieving this ideal for safety standards, it has no agenda-setting process at all for health standards. In reality, its priorities for health standards are determined in an ad hoc fashion by outsiders. Virtually every knowledgeable observer of the OSHA rulemaking process agrees that this is a sorry state of affairs that is badly in need of correction. There is less agreement, however, on how OSHA should go about regaining control over its own agenda.

A. The Need for a Prioritization Process.

An appropriate metaphor for the current OSHA standard setting process is that of a business establishment with a front door, a side window, and a back door. The owner expects most business to come through the front door, but it reserves the back door for dealing with complaints about previous transactions. Especially demanding and impatient customers come in through the side window and thereby avoid the crowd that is pressing at the front door. In the OSHA context, criteria documents, recent petitions, information from the field, and recently amended recommendations from private standard setting organizations are all pressing at the front door. OMB and the White House are pushing some previously promulgated rules in through the back door, and Congress and the courts are forcing some rulemaking petitions and other "hot" topics through the side window. At present, the press of business for OSHA's reduced staff from the back door and side window is so great that it cannot accept any business through the front door. Instead of an orderly queue at the front door,there is a great crowd of potential topics, each of which is probably deserving of OSHA's attention. Occasionally, an interest group becomes impatient with waiting in line and moves over to the side window. The time is near at hand when there will also be a disorderly crowd at the side window, petitioning Congress or the courts to demand that OSHA take up additional topics. OSHA long ago lost control over its front-door agenda; it now risks total paralysis as its limited capacity to produce rules becomes overwhelmed by the press at the side window.

The current process does not necessarily result in greater worker protection, because no one of the outside parties driving the current process is concerned with the broad question whether the agency is addressing those topics for which it can be most effective in reducing the most serious workplace risks. OSHA's inability to set its own priorities also affects the regulated industry's ability to make future investment decisions. An explicit and open prioritization procedure would allow OSHA to regain to some extent control over its own agenda, and it would make regulatees and beneficiary groups aware of OSHA's plans for the future. An explicit prioritization mechanism would also be useful to OSHA in its internal management and in managing outside contracts for economic and technical analysis. A commitment to establishing an explicit prioritization process will, however, force the agency to come up with a rational scheme for ranking priorities, and it will force upper level decisionmakers to make hard decisions about which subjects warrant attention.Although OSHA can expect resistance from those with an economic interest in the hazards that wind up on the list, OSHA must assume control over its own rulemaking agenda.

> RECOMMENDATION: OSHA should as rapidly as possible establish an entity to determine an explicit list of agency priorities to which OSHA will presumptively adhere in undertaking future rulemaking intiatives.

B. Alternative Prioritization Schemes.

Although the question of prioritization is never an easy one for an agency charged with writing high-stakes regulations in an area dominated by poor information and huge uncertainties, there are several broad models from which OSHA may choose in selecting an approach to prioritization, including ad hoc management choices, systematic selection by committee, numerical scoring systems, and quantitative risk assessment. The advantages and disadvantages of each broad approach are discussed in detail in the Report.

We strongly recommend that OSHA establish a procedure for priority-setting for its rulemaking activities. Since OSHA does not currently have a priority-setting mechanism in place, this will require additional resources or a reprogramming of existing resources.

> RECOMMENDATION: OSHA should make priority-setting a high priority. The agency should consider devoting at least one full-time staff person to the task, and the priority setting unit should be given sufficient resources to gather information on candidates for priority lists and to perform risk assessments and megascoring exercises.

The Committee approach seems the most promising of the three approaches discussed in the Report.

> RECOMMENDATION: OSHA should establish a permanent prioritization committee charged with drafting an initial ranked list of agency priorities from the 47 topics that resulted from the standards improvement project and from pending rulemaking petitions. The committee should be further charged with meeting on a continuing and periodic basis to re-examine the existing list, add items to it, and remove items from it. To preserve badly needed continuity, committee membership should not turn over any more rapidly than once every three years, and committee members should be eligible for reappointment.

The membership of the committee should reflect both technical expertise and political sensitivity. One way to ensure this would be to make the Committee a formal advisory committee composed of nonemployees consisting of technical experts and representatives of a broad range of constituency groups. Such a committee could not, however, be an actual decisionmaking entity; it could only make recommendations to agency management. Alternatively, the committee could be composed of agency employees from various offices in the agency and chaired by a very high level agency employee, such as one of the Deputy Assistant Secretaries.

> RECOMMENDATION: OSHA should establish a prioritization committee made up of OSHA employees with nonvoting representatives from NIOSH and EPA. The committee should be composed of high level management staffers at at least the Deputy Director level and highly regarded health professionals from the agency's technical

> staff. The Committee should meet regularly (at least quarterly and perhaps monthly) to establish an initial prioritization list and to consider amendments to the list. The meetings, which would discuss policy as well as technical considerations, should be closed to the public, but the results of the meetings should be made public, after the Assistant Secretary has had an opportunity to consider and overrule any decision made by the committee.

If the committee is established in accordance with the above recommendation, its first task of drafting an initial ranked list will be quite burdensome and no doubt controversial. OSHA could reduce some of the controversy surrounding its initial list by subjecting it to public comment and by assigning substances to ranked categories, rather than attempting to rank each topic individually.

> RECOMMENDATION: The entity that establishes agency priorities should publish and allow public comment on a proposed list of 50-75 rulemaking topics. The list should either rank the topics individually or assign them to classes. OSHA should take the position that the list is not a final rule for which judicial review would be appropriate.

One possible device to aid the committee in this initial task would be to hold one or more "consensus workshops" that all committee members would attend and during which all of the relevant interest groups would attempt to agree on a consensus list of priorities.

> RECOMMENDATION: Prior to establishing an initial priority list, OSHA should hold one or more consensus workshops at which relevant interest groups would be asked to agree upon a consensus list of priorities.

The Committee should use existing risk assessments in establishing its initial prioritization list and in undertaking subsequent modifications, but it should be aware of the drawbacks of risk assessments, and it should not allow risk assessments alone to determine priorities. Existing "megascoring" schemes are so laden with pitfalls that the Committee should devote little attention to them. If the Committee is to perform its ambitious task expeditiously, it must resist the temptation to develop its own megascoring device and proceed ahead with whatever information is conveniently available. The Committee should likewise resist the temptation to incorporate by reference lists of toxic chemicals that have been developed for other purposes.

> RECOMMENDATION: The entity that establishes agency priorities (subject to approval of the Assistant Secretary) should use existing risk assessments, as well as other technical and policy considerations, in carrying

> out its task. It should not commission full-blown risk assessments in setting the initial priorities list, but it may decide to develop more sophisticated risk assessments in modifying the list. The entity should not develop its own megascoring device for setting priorities, and it should not incorporate by reference lists prepared by other agencies for other purposes.

The committee and its staff should begin with a relatively long list of potential candidates for its priority list and it should at the end of a relatively short period of time (perhaps six months) produce a ranked or graded list for circulation and comment. After the first list has been completed, the committee should continue to monitor scientific reports and other developments for information that might cause the agency to change the list. In particular, the committee should have systematic access to reports from the field for indications that topics not on the list deserve greater agency attention. OSHA should therefore continue its efforts to make information from the field more accessible to agency decisionmakers.

To preserve needed flexibility, OSHA should establish an additional "side window" process for workplace hazards that are identified after the list is promulgated or for which important policy considerations warrant rapid treatment. The "side window" process would be used for rulemaking petitions and TSCA referrals, which would be treated as petitions to amend the current priorities list. OSHA would respond within a definite time period (perhaps 120 days). The agency must not, however, allow the side window to become the dominant source of rulemaking initiatives. To prevent this, OSHA should promulgate procedural regulations governing petitions and TSCA referrals, specifying criteria for giving expeditious treatment to a topic. Such criteria should include: (1) the degree of hazard; (2) the quality of the data indicating hazard; (3) the administrative resources required to undertake the new project; (4) the match between the expertise required for the project and the expertise available to the agency; (5) whether the proposed project would result in greater protection for workers than projects currently at the top of the list; and (6) other important public policies. In the final analysis, the agency must demonstrate to the public that the more rational front-door process does in fact work. And this means that OSHA must bring rulemaking initiatives to completion on a regular basis.

> RECOMMENDATION: OSHA should establish a process for expediting prioritization decisions for topics that are the subject of TSCA referrals, rulemaking petitions, and intense pressure from Congress, OMB and the White House. Although this expeditious process should be separate from the agency's routine prioritization process, it should be closely integrated with the routine

> process. The outcome of the expedited process should be the placement of the topic on the priority list or a determination not to proceed ahead with the project and a public explanation for the action.

Once OSHA establishes a workable process for prioritizing future projects that is sufficiently flexible to address legitimate requests for priority changes, it should have little to fear from a lawsuit requesting a court to order it, in effect, to move a project to the top of the list.

Since Congress intended that OSHA rely upon NIOSH for technical advice in setting priorities, OSHA should solicit NIOSH's input in assembling the initial prioritization list. OSHA should also communicate changes in its priorities to NIOSH at a very early stage, so that NIOSH may schedule its projects to complement OSHA's rulemaking efforts. More importantly, OSHA should attempt to adhere to its original prioritization plan as closely as possible to avoid schedule conflicts and wasted resources. Since OSHA will never be able to adhere completely to any pre-established priority list, it should work with NIOSH to add some flexibility to NIOSH's schedule. In particular, NIOSH should maintain a capacity to respond on a "fast track" to OSHA requests for technical help on projects that come through the "side window."

> RECOMMENDATION: OSHA should include NIOSH in drafting its initial priority list and it should make NIOSH aware of all changes to that list. OSHA should work with NIOSH to establish a capacity in NIOSH to respond rapidly with information on projects that are assigned to move on a fast track through OSHA.

Finally, OSHA should also coordinate carefully with the National Toxicology Program (NTP) and EPA concerning OSHA's future information needs. Both NTP and EPA have the capability of generating new information on suspect chemicals, a capacity that OSHA lacks. If OSHA could arrive at a priorities list that extended three or four years in the future, it could approach NTP or EPA to initiate studies on the chemicals that would be the subjects of future rulemaking initiatives. OSHA should also coordinate with EPA to take advantage of any authorities that EPA has to protect employees more effectively than OSHA can under its own authorities.

> RECOMMENDATION: OSHA should attempt to enter into a formal interagency agreement with EPA and NTP for making EPA and NTP aware of OSHA's needs for testing toxic substances to which workers

> are exposed. OSHA should also attempt to enter into a formal interagency agreement for coordinating the exercise of the authorities of the two agencies in way that most effectively protects employees from workplace risks.

Although OSHA has undertaken some modest informal efforts in the last six years to coordinate with other agencies, there is no formal institutional entity with the capability of ensuring appropriate communication and forcing necessary cooperation. The interaction that does occur is at lower levels where bureaucratic "turf" considerations overwhelm the current meager incentives to cooperate. During the Carter Administration, the Interagency Regulatory Liaison Group, which was composed of the heads of OSHA, EPA, FDA, CPSC, and FSIS, provided the institutional impetus to cooperation. OSHA should pursue the possibility of reviving the IRLG or of creating a similar entity to perform the coordination function suggested here.

Establishing an IRLG-like coordinating institution would require some additional resources in resource-scarce times, but the savings in avoided duplication alone should be worth the cost. The most foreboding obstacle to setting up such an institution is likely to be the Office of Management and Budget, which perceives itself as playing this coordinating role. The short answer to this objection is that OMB has had since the abolition of the old IRLG in 1981 to fill the gap, and it has not done so. The coordination function for OSHA standard setting must be initiated and operated by the agencies themselves, and it must have the support and active participation of officials at the very highest levels of those agencies.

> RECOMMENDATION: OSHA and other health and environmental agencies, such as EPA, the Food and Drug Administration, the Food Safety and Inspection Service and the Consumer Product Safety Commission, should form a high level group charged with coordinating agency policies and information relevant to regulating health and environmental hazards.

III. Management and Accountability.

Although the extraordinarily lengthy interval between initiation and publication of OSHA rules has been the subject of negative commentary for years, the agency seems no closer to a solution than it was in the mid-1970's. While some of OSHA's problems may be systematic or externally imposed, OSHA can significantly improve its internal management, and such improvements should substantially reduce the incidence of grossly delayed rulemaking initiatives.

A. Evaluation of the Current Rulemaking Management System.

OSHA has traditionally been organized along functional lines, maintaining separate Directorships for Health Standards, Safety Standards, Technical Support, Field Operations, Policy and Administrative Programs. OSHA is only one of many agencies in the Department of Labor, and it must clear important rulemaking actions at the Departmental level. The Department has always maintained a separate Solicitor's Office, apart from the individual operating agencies, to provide legal advice to all of the agencies within the Department.

In its early years, OSHA was a very loosely run organization, and especially so in its rulemaking functions. In 1982 OSHA implemented extremely complicated internal procedures that are best described as "byzantine." Their excessive documentation requirements and repetitive review procedures provided almost insuperable barriers to the production of rules, and in fact only one rule of any consequence was produced during the 3-4 years that those procedures were in place. After a time, the intricate rules were observed mostly in their breach, and in late 1985 they were abandoned. The 1982 procedures have not been replaced with any particular management regime.

Despite the elimination of the burdensome 1982 paperwork requirements, the agency's internal production has speeded up only slightly. OSHA still needs a management and accountability system to ensure that upper level management's priorities are communicated to lower level staff, to ensure that bottlenecks do not develop, and to ensure that responsible agency officials are held accountable for inexcusable delays. To accomplish this result, OSHA management must seriously address at least six severe management problems that currently plague OSHA's internal rule management process: (1) the absence of effective mechanism for establishing and monitoring deadlines for achieving internal milestones; (2) inadequate incentives to meet established deadlines; (3) the absence of a mechanism for facilitating policy interchange between upper level management and lower level staff; (4) the lack of coordination among essential institutional actors; (5) the inability or unwillingness of upper level management to make difficult substantive decisions in a timely fashion; and (6) inadequate resources.

B. Establishing and Monitoring Deadlines.

At present, OSHA has in place only the most rudimentary system for setting deadlines for its regulatory activities. The Work Plan that some project officers prepare at the outset of a project and the Options Memorandum that is prepared for Departmental review contain proposed timetables, but these deadlines are never formally affirmed and they are rarely enforced. Upper level management meets twice a year to prepare the agency's proposed regulatory agenda for submission to Departmental officials and OMB. But the deadlines in the agenda are not regarded seriously by most agency employees, and they are only very rarely met in practice. The deadlines taken most seriously by agency staff are unpublished deadlines set in informal status meetings. These meetings, however, occur after various milestones are met, and not at specific pre-arranged time intervals. Time projections are continually subject to informal adjustment without explanation as priorities change due to outside pressures or other resource needs. The meetings are therefore not effective as "action-forcing" devices.

OSHA does not have any systematic approach for tracking the progress of its rulemaking initiatives. The project officer from the Health or Safety Standards Directorate is responsible for keeping the action on schedule, and the Director maintains close enough contact with the staff to know which actions are on track and which actions are slipping. The Office of the Assistant Secretary does not currently have a formal way of ascertaining on a periodic basis the status of OSHA's rulemaking. As one official explained: "We keep it in our heads." While such informal tracking devices may be appropriate for an institution with a small number of responsibilities that are of limited societal importance, they are entirely inappropriate for a modern federal agency of OSHA's status.

OSHA must establish a system for establishing and monitoring progress toward the attainment of realistic deadlines for its rulemaking initiatives. It is critical that these deadlines be attainable and not pie-in-the-sky projections. Yet once realistic deadlines are established, they should not be easily avoided. Since rulemaking initiatives are invariably prolonged affairs, the system should be capable of setting and tracking both major milestones such as the Assistant Administrator's approval of rulemaking projects, and less visible minor milestones, such as the time that all relevant offices must assign a staff member to the project. The Environmental Protection Agency has established a computerized "Action Tracking System," described in detail in the Report, that could serve as a useful model for a similar system of establishing and tracking deadlines in OSHA.

Effective implementation of an Action Tracking System could greatly improve the internal rulemaking process in OSHA. Rules could no longer disappear into the bowels of the agency, never to be seen again, because all approved rulemaking initiatives would be in the tracking system. The system would also be useful in uncovering bottlenecks. Finally, the Action Tracking System could identify resource conflicts and point to programs that need more resources.

The Action Tracking System is not, however, without its disadvantages. First, its heavy emphasis on meeting production deadlines may sacrifice quality. Second, it will require additional staff. Third, a high degree of upper level attention is absolutely critical to the successful operation of the system, and this is necessarily quite demanding of very high level officials. Fourth, the information in the action tracking system can become public, putting the agency in an embarrassing position before courts and congressional committees.

In the final analysis, however, the advantages of the action tracking system far outweigh its disadvantages. Quality need not be sacrificed for "bean counting," if the agency is conscious of the problem, plans its resource needs in advance, matches those needs to realistic projections of resource availability, and allows deadline slippage for genuine quality concerns. Because the system would rely heavily upon computers, its personnel demands would be slight, and computer resource needs would not be large. Revealing slippage to the world may be embarrassing, but it also renders the agency accountable to the public.

> RECOMMENDATION: OSHA should immediately establish an Action Tracking System, modeled on the system in effect at the Environmental Protection Agency, to document the progress of rulemaking initiatives. The system should contain deadlines for meeting standardized major milestones and additional intermediate minor milestones in the progress of a rule's development. The Assistant Secretary or one of the Deputy Assistant Secretaries should meet on a biweekly basis with the Directors and Deputy Directors of the OSHA Directorates, the Deputy Assistant Solicitors for OSHA Health and Safety Standards, and perhaps a representative from the Departmental Policy Office to discuss progress toward designated milestones and reasons for any missed deadlines. OSHA should appoint a staff of one or two employees, which might be lodged in the Policy Office, to manage the Action Tracking System.

C. Inadequate Incentives.

There is a general sense among agency staff that agency management does not reward production and does not penalize lethargy. Management has very few tools available for providing incentives. The agency has a very limited budget available for cash awards and merit bonuses, and penalties for nonproduction are very difficult to administer.

Given the large salary differentials between the public and private sectors, a sense of mission may be the most significant tool that OSHA has to attract and retain energetic professional staff. But symbols are fragile--if they are not backed up with resources, they will appear hypocritical and quickly be ignored. The Action Tracking System described earlier has the built-in incentive of avoiding embarrassment, which is usually effective for professionals in bureaucracies. But there should also be financial incentives to reward good and speedy work.

> RECOMMENDATION: Upper level management in OSHA should attempt to convey to OSHA professionals the message that OSHA's task is an important one that requires commitment to the expeditious implementation of the agency's statutory mandate. OSHA management should reinforce such symbolic messages with real rewards for expeditious work and penalties for unwarranted delays.

D. Coordination Among Institutional Actors.

Developing a rule requires the input of several institutional entities within OSHA and the Department of Labor. The Policy Office in OSHA is responsible for gathering cost and feasibility information. The Solicitor's Office, which is not part of OSHA, must review documents to be published in the federal register, draft certain parts of those documents, and prepare expert witnesses for testimony at the hearings. Since the project officer has no direct control over these other crucial actors, the project officer must either induce them to do their jobs in an expeditious fashion, do their jobs for them, or elevate matters to mid-level management. But even at higher levels, the three offices have encountered problems in coordinating their priorities.

The Directors of the Health and Safety Standards Directorates have traditionally attempted to coordinate informally with their counterparts in the other Offices on an ad hoc basis, but this has not generally proved satisfactory. First, the need for coordination too often becomes apparent only after problems have already arisen. Second, the ad hoc approach deals with only those problems that are of sufficient magnitude that the project officer brings them to the attention of the Office Director. Third, the informal approach will not resolve genuine disagreements over what the priorities should be. Finally, the informal approach will not prevent the other offices from using delay to advance particular substantive agendas. A more formalized procedure is needed to force coordination among the relevant institutional actors and to obtain upper level resolution of differences on a regularized basis.

The Action Tracking System described previously is an ideal vehicle for this purpose. With such a system in place, the Health or Safety Standards Directorate would enter a proposed schedule into the system at the time the project was approved by upper level management. The other relevant offices would have an opportunity to comment upon the proposed schedule before it became final. Any disputes over the proposed schedule could be resolved in one of the periodic high level meetings. If a deadline was missed, the responsible offices would be obliged to explain the slippage at one of the meetings. The location of the bottleneck or delaying activity would become immediately apparent, and resource needs could be identified. Conflicts in priorities would also be revealed to upper level management who would then be in a position to resolve such conflicts on-the-spot.

In addition, the team concept, which OSHA formally abandoned in 1985, can help avoid schedule conflicts at the lower levels in the agency. At the most basic level of interaction between the essential institutional actors, there is in fact a good deal of coordination. The problems with the team concept that the agency encountered in the early 1980s can be overcome. Although the team leader does not have line authority over other members of the team, an Action Tracking System should provide some inducement to team members to perform expeditiously. The team approach does raise the possibility of "renegade teams" that form their own opinions on issues and inform the press when those opinions differ from those of agency policymakers. While this may be a problem during a time of weak management and very low agency morale, the fear that lower level staff will gang up on upper level decisionmakers is not a good reason to abandon a vital decisionmaking tool. Finally, when a team that works well together is established, there is every reason to keep it together to work on other projects.

> RECOMMENDATION: OSHA should formally reinstate the team concept to perform the basic tasks of gathering or analyzing information, drafting documents, responding to comments and advising the Assistant Secretary. OSHA should attempt to coordinate rulemaking initiatives through the Action Tracking System previously recommended. OSHA should consider allowing successfully functioning teams to work on more than a single rulemaking initiative.

E. Lack of Policy Interchange.

OSHA lacks a procedure for communicating policy from upper level management to the low level professionals who draft rules. Typically, once a rule is assigned to a project officer, he or she is allowed to develop the rule, with the help of other employees drawn from OSHA and the Solicitor's Office, without much upper level supervision until there is a draft of a notice of proposed rulemaking. While this maximizes the freedom of lower level staff to incorporate technical data and scientific and engineering judgments into the final rulemaking product, it minimizes upper level policy input. Purely technical considerations may cause lower level staff to eliminate alternatives that might be attractive from a policy perspective, thereby depriving upper level management of an opportunity to chose from among a full range of options.

This hierarchical approach to developing a proposed rule has a vast potential for unnecessary delay. If the upper level managers are dissatisfied with the staff's output, they may either send the staff back to the drawing board or return the project to the staff for time-consuming patch and repair. In the absence of written acounts of important decisionmaking meetings, agency staffers are obliged to decide many issues anew in future proceedings.

OSHA could reduce this large potential for duplicative and time-consuming remands to the staff by establishing an "Options Review" process for periodically elevating issues from the staff level to very high levels in the agency. Under this approach, which has been effectively implemented at the Environmental Protection Agency, Options Review meetings are held at critical junctures to choose which regulatory options the agency will actively pursue throughout the remainder of the rulemaking process. The participants in the Options Review meetings are a very high level official (at least a Deputy Assistant Secretary) and other high level agency employees representing offices with an interest in the proceeding. The Options Review meeting, which is memorialized in a closure memorandum, occurs after the team has devoted some study to the relevant issues but before it has narrowed down the options to the two or three to which it will devote the bulk of its attention. The Options Review process gives upper level management a large role in the subtle policymaking that goes on at low levels in the bureaucracy when options are examined and rejected as the staff attempts to reach consensus. Low level staff are also attracted by its potential to force high level resolution of difficult policy issues. By giving the lower level professionals a "day in court" before a high level agency decisionmaker early in the process, the process interjects a "creative" adversarial note into internal agency deliberations.

The chief disadvantage to the Options Review process is that it consumes a great deal of the time of very high level officials. Second, the process demands that very high level officials narrow options on the basis of a relatively brief debate. Third, it requires upper level decisionmakers to take direct responsibility for difficult decisions. On balance, however, the advantages of the Options Review mechanism outweigh its disadvantages.

> RECOMMENDATION: OSHA should implement an Options Review process for important health and safety rulemaking initiatives. At least once in the early development of such rules the staff should identify and analyze several options for consideration in an Options Review meeting chaired by the Assistant Secretary or one of the Deputy Assistant Secretaries. The goal of Options Review meetings should be to discuss and debate broad alternatives for approaching a rulemaking initiative and to narrow the range of options to be considered in the future. The meeting should be memorialized in a closure memorandum that would be made available to staff involved in other rulemaking initiatives.

OSHA could conceivably fold an Options Review Process into the implementation of an Action Tracking System, should it choose to adopt that system. The key to a successful Action

Tracking System is the periodic (biweekly in EPA) meetings of the Deputy Administrator with mid-level management to report on the status of pending projects. Similarly, the key to the Options Review Process is the meetings of the Deputy Administrator with upper and mid-level management to narrow options. In a small agency like OSHA, it may be possible to combine these two functions in to a single two-part "Status Review and Options Selection/Rejection" meeting of the Assistant Secretary or one of his Deputies with mid-level management.

G. Inability to Make Difficult Decisions.

Since delay is always in the interest of some interested party, OSHA decisionmakers often face strong pressures not to decide difficult questions. Decisionmakers may also have technical reasons for not deciding, such as the desire to await the completion of one more study that has the potential to reduce some very large uncertainties. Sometimes there is a legitimate need to do further work to avoid the possibility of reversal in the courts of appeals, but sometimes the desire for more information is a convenient excuse not to decide difficult questions.

OSHA has shown an increasing tendency to rely upon Advance Notices of Proposed Rulemaking (ANPRs) to solicit information for regulated industries and other interested parties. The ANPR can be an effective tool for gathering information early in the development of a rule. But there is a general feeling among agency staff and among outside practitioners that the ANPR rarely results in the production of useful information. Most observers of the process believe that the ANPR at best serves the function of putting companies on notice that the agency is seriously considering promulgating a standard for them; it rarely induces them to share useful information with the agency. Since it can delay the rulemaking schedule by six months to a year, the ANPR can be used to avoid hard decisions.

> RECOMMENDATION: OSHA should not routinely use the Advance Notice of Proposed Rulemaking as an information gathering technique. Only when information that is not available through other vehicles is very likely to be forthcoming in response to an Advance Notice of Proposed Rulemaking should that tool be used.

There is a generally shared belief among the lower level staff that past Assistant Secretaries, for whatever reasons, took too long to make policy decisions and communicate them to the staff. A related complaint is that upper level decisionmakers sometimes return controversial rules to the staff for further work on particular issues knowing full well that the additional work is not likely to be outcome-determinative.

It is difficult to determine how much of this perception is attributable to an unwillingness of upper level management to decide hard questions and how much is due to the impatience of agency staff and beneficiary groups. Some rules have been put off indefinitely out of upper level management fears of stirring up political controversy. But upper level management, which is ultimately responsible for the agency's output, has every right to demand further analysis of critical issues, even when it is not obvious to the staff that further analysis will change the ultimate outcome. Part of the problem is probably the lapse of "management memory" that accompanies the rapid turnover rate in OSHA's upper level management.

There is no easy way to address these potential sources of delay. Clearly, management should attempt to alleviate staff concerns that their efforts will be placed on the back burner for political reasons. But the staff must be sensitive to the realities of the political world in which upper level decisionmakers must deal. To some extent the problem may be alleviated by better communication between staff and upper level officials. If lower level staff professionals were allowed to attend the Options Review meetings proposed in this Report, better communication might result. Of course, as a quid pro quo, lower level professional staff cannot feel free to leak the contents of such discussions to the media.

H. Inadequate Resources.

If OSHA is serious about increasing its ponderous rule-generating pace, it must demand a substantial infusion of resources. The Health Standards Directorate is seriously understaffed. Individual health professionals in that Directorate are responsible for multiple projects. At the same time they are attempting to manage the rule generation process, they must answer correspondence for projects that they are assigned, answer petitions for new rulemaking initiatives, draft responses to TSCA referrals, meet with other agencies, and meet other professionals. In addition, OSHA badly needs the infusion of fresh blood. The creation of new positions in the Health Standards Directorate would allow the agency to hire new staffers.

> RECOMMENDATION: OSHA should seek additional resources for the Health Standards Directorate. It should attempt to fill any new slots for occupational health specialitists with highly motivated young professionals.

The recommendation that the agency seek additional resources in a time of severe monetary constraints on social programs that provide long-term benefits may well fall on deaf ears, but that makes the need no less critical. It is hypocritical for Congress and OMB to criticize OSHA for poor work if they are unwilling to provide sufficient resources for the agency to do a good job. Whether or not OSHA gets new resources for expanding the size of the Health Standards Directorate, it can make some management improvements that should result in more efficient use of existing resources.

I. The Difficult Environment of OSHA Regulation

Health and safety agencies, such as OSHA, have significant constraints that limit productivity. No health and safety agency has been able to promulgate regulations for more than two or three controversial chemicals in any year.[1] During its entire sixteen year history, OSHA has completed only eighteen health[2] and twenty-six safety regulations.[3] That record, however, should not be denigrated. Not only does OSHA labor under the same constraints as other health and safety agencies, but it has additional, serious limitations not faced by most of its counterparts. When these additional limitations are taken into account, it is surprising OSHA has been able to regulate at all.

Any proposal for reform of OSHA must therefore be made in light of the various constraints that limit regulatory productivity. Both constraints that affect regulation in general and OSHA in particular are considered.

A. General Constraints Affecting Regulation

The productivity of health and safety agencies is limited by four types of constraints. Agencies face substantive, managerial, legal, and political limitations.

1. Substantive Constraints

Agency productivity is limited as a substantive matter by the necessity to undertake the complex scientific and policy judgments required by Congress and the White House. Agencies must engage in the type of risk, benefit, and cost or feasibility determinations required by their statute.[4] In most cases, they must also calculate the benefits and costs of any proposed regulations to satisfy Executive Order 12291.[5]

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[1] R. MERRILL, FEDERAL REGULATION OF CANCER-CAUSING CHEMICALS, 1982 ACUS 113; see also Toxic Substances: EPA and OSHA Are Reluctant Regulators, 203 SCIENCE 28 (1979) (EPA and OSHA take "years" to complete a rulemaking proceeding).

[2] U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, PREVENTING ILLNESS AND INJURY IN THE WORKPLACE 363 (1985) (cited hereinafter as PREVENTING INJURY); see, also Schroeder & Shapiro, Responses to Occupational Disease: The Role of Markets, Regulation, and Information, 72 GEO. L.J. 1231, 1257 (1984) (cited hereinafter as Responses To Occupational Disease).

[3] PREVENTING INJURY, supra note 2, at 364.

Risk assessment requires that the reliability of safety data be evaluated and that its relevance for human exposure, use, or consumption be determined.[6] These assessments require both scientific judgments, to determine such matters as the statistical validity of an animal experiment,[7] and policy judgments, to determine such matters as how to predict the consequences of human exposure from animal studies.[8] Policy judgments like the prediction of human risk are especially complex because animal test data is often limited, because humans may be more or less susceptible to toxic effects than the animals studied, and because human exposure or use may occur under different conditions which impose different degrees of risk.[9]

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[4] See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136d (1982); Consumer Product Safety Act, 15 U.S.C. § 1262(i) (1982); Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(d) (1982); Food Drug & Cosmetic Act, 21 U.S.C. § 348(c) (1982) (food additives); id. at § 355 (new drugs); Clean Air Act, 42 U.S.C. § 7408 (1982); see generally Cross, Beyond Benzene: Establishing Principles For a Significance Threshold On Regulatable Risks of Cancer, 35 EMORY L.J. 1, 5-12 (1986).

[5] Exec. Order 12291, 3 C.F.R. § 127 (1981), reprinted in 5 U.S.C. § 601, at 431 (1982); see note 113 infra & accompanying text (OMB oversight of OSHA).

[6] See, Shapiro, Scientific Issues and The Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry, 1986 DUKE L.J. 288, 291-92 (cited hereinafter as Scientific Issues). Relevant data usually consist of experiments conducted to evaluate the effect of a substance on animals and epidemiological studies evaluating the effect of prolonged exposure to a substance. Id. at 292. In a few cases, there will be data from clinical experiments performed on humans. Id.; see Shapiro, Divorcing Profit Motivation From New Drug Research: A Consideration of Proposals To Provide FDA With Reliable Test Data, 1978 DUKE L.J. 155, 157-58 (human evidence is used by FDA); see generally NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS (1983) (cited hereinafter as RISK ASSESSMENT IN THE FEDERAL GOVERNMENT).

[7] Scientific Issues, supra note 6, at 295.

[8] Id. at 294; McGarity, Substantive and Procedural Discretion in Administrative Resolution of Scientific Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 GEO. L.J. 729, 731-49 (1979 (cited hereinafter as Resolution of Scientific Policy Questions).

Benefit assessment requires an estimate of how many lives might be saved by a proposed regulation and a calculation of the economic value of those lives.[10] The first estimate is based on a risk assessment which, as explained above, in itself is difficult to derive.[11] The second estimate is hampered by the inability to quantify the value of human life, the inability to price reduced risks to persons not yet in existence, and the tendency to ignore other variables that are difficult to quantify in monetary terms (such as psychological costs).[12]

Cost and feasibility analysis requires an agency to sum the forecasted costs of implementing various levels of protection for consumers or workers.[13] Agencies have difficulty acquiring reliable cost information and, when the information exists, it can produce uncertain predictions.[14] Agencies also have difficulty evaluating the costs of secondary economic effects, such as anticompetitive and employment effects, because of their amorphous nature.[15]

The previous determinations are necessarily time-consuming because an agency must find the required information and undertake the relevant assessments. Although OSHA is subject to that problem, it also has several additional problems as compared to other health and safety agencies. For example, because the Food and Drug Administration (FDA) is a licensing agency, it generally enjoys more cooperation from its regulated industries. Since industry must obtain FDA's approval to market a product, it is in its economic interest to cooperate with the agency.[16] By comparison, industry's economic incentive at OSHA is to delay regulation. Even if OSHA eventually orders an industry to undertake expensive changes, considerable savings can be generated if those costs can be postponed.[17]

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[9] Responses To Occupational Disease, supra note 2, at 1231-37; McGarity, Media Quality, Technology, and the Utilitarian Ideal: Alternative Strategies for Health and Environmental Regulation of the Chemical Industry, 46 LAW & CONTEMP. P. 159, 185 (1984) (cited hereinafter as Alternative Strategies).

[10] Alternative Strategies, supra note 9, at 188.

[11] See supra note 9 and accompanying text.

[12] Alternative Strategies, supra note 9, at 188-89.

[13] Id. at 181-82.

[14] Id. at 181.

[15] Id. at 183.

Another and related advantage of FDA is that it has the legal authority to require drug manufacturers to test the safety of new drugs in both animals and humans.[18] By comparison, OSHA, which lacks similar authority, has a more difficult time acquiring the safety information necessary to make a decision.[19] Moreover, OSHA has the more difficult task of normally having only animal data to predict the consequences of human exposure.[20] Finally, because it acts on any application it receives, FDA does not have to set priorities concerning what chemicals it will regulate. OSHA, however, must spend some of its scarce resources to resolve difficult questions concerning what chemicals should be regulated before others.[21]

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[16] Interview with Ben Mintz, Professor of Law, Catholic University, in Washington D.C. (September 25, 1986) (former head of OSHA Division, Office of Solicitor, Department of Labor).

[17] Interview with David Vladeck, Public Citizen, in Washington, D.C. (Sept. 25, 1986); Interview with Ben Mintz, supra, note 16; see Huber, The Old-New Risk Division in Regulation, 69 VA. L. REV. 1025, 1035 (1983) (under licensing regulation, the regulatee bears the risk and cost of delay, but under standard setting the regulatee derives economic benefits from delay).

[18] See McGarity & Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, 93 HARV. L. REV. 837, 868-69 (1980); Shapiro, Limiting Physician Freedom To Prescribed A Drug For Any Purpose: The Need for FDA Regulation, 73 NW. U.L. REV., 801, 803 (1978) [cited hereinafter as Need for FDA Regulation].

[19] See Part IIIG infra (OSHA lacks information necessary to reach decisions); see generally Huber, supra note 17, at 1034 (licensing regulation places cost of acquiring necessary information on the regulatee, while standard setting places that cost on the agency.).

[20] See Responses To Occupational Disease, supra note 2, at 1258.

[21] See Part II infra.

The Environmental Protection Agency (EPA) also has several advantages over OSHA. When EPA acts as a licensing agency,[22] it enjoys the same advantages as FDA that result from that function.[23] Furthermore, EPA did not engage in the past in both risk and feasibility analysis to determine national ambient air quality standards, although lately it has undertaken both responsibilities to submit data to OMB. EPA did not feel compelled to undertake risk analysis because Congress mandated the agency to regulate, giving it the discretion to determine only what level of regulation was appropriate.[24] EPA also can assess cost data more easily than OSHA because the technology used to control exposure is often sold by vendors which are independent of the regulated industry.[25] Finally, feasibility analysis in some of EPA's programs does not involve the difficult value choices that cause OSHA so much trouble. For example, OSHA must choose whether to implement its standards through expensive engineering controls, such as ventilation systems, or through less expensive personal protective devices, such as respirators.[26] As a result, OSHA feasibility analysis is usually bitterly contested between unions, which favor engineering controls, and the regulated industry, which favors personal protective devices.[27]

Because of the previous disadvantages, OSHA faces evaluation problems that are more complicated, its access to information is more limited, and it has more responsibility to choose which chemicals to regulate. These difficulties are compounded by the common and unique managerial constraints under which OSHA operates.

2. **Managerial Constraints**

Because government has difficulty attracting and retaining good scientists and policy experts,[28] agencies become dependent on advisory committees and consultants to carry out their regulatory missions.[29] This dependence, however, creates problems of accountability and coordination for these agencies.[30]

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[22] See 7 U.S.C. § 136 (1984) (FIFRA); see also, 15 U.S.C. § 2603(a) (1982) (TSCA).

[23] See notes 17-18, 21 supra and accompanying text.

[24] See T. MCGARITY, REGULATORY ANALYSIS IN THE FEDERAL GOVERNMENT, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES III-389 (1985).

[25] See, e.g., D. McCAFFREY, OSHA AND THE POLITICS OF HEALTH REGULATION 87 (1982) (Society of the Plastic Industry claimed vinyl chloride standard would shut down the industry, but firms manufacturing or using the chemical subsequently had little difficulty complying with the regulation.).

[26] Responses To Occupational Disease, supra note 2, at 1259.

[27] Id.

Health and safety agencies are also constrained by the size of their staffs. Because agencies have a relatively small number of scientists to undertake rigorous scientific and policy analysis, only a few chemicals or products can be considered for regulation at any one time.[31] Budget and staffing constraints have increased this concern. The growth in government spending on regulatory activities has slowed considerably in the first five years of the Reagan Administration (increasing by only eleven percent in nominal dollars from FY 1981-85). And overall staffing by regulatory agencies has fallen by eleven percent in the same period.[32]

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[28] See DEPARTMENT OF HEALTH, EDUCATION & WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, FINAL REPORT 45 (1977) (cited hereinafter as HEW FINAL REPORT). Scientists and policy analysts are discouraged from government work because salaries are often noncompetitive, there are fewer opportunities for esteem and personal satisfaction, and they regard the regulatory function to be bureaucratic and uninteresting from a scientific perspective. Id. at 45-46.

[29] Scientifc Issues, supra note 6, at 302-303.

[30] Id.

[31] See Mendeloff, Does Overregulation Cause Underregulation? The Case of Toxic Substances, REGULATION, Sept./Oct., 1981, at 50 (cited hereinafter as Does Overregulation Cause Underregulation?) (Shortage of personnel restricts scope of EPA and OSHA activities and increases burdens on executive scientific staff); Levin, Politics & Polarity: The Limits of OSHA Reform, REGULATION, Nov./Dec., 1979, at 37 (Since its inception, OSHA has been "drastically underfunded for its mission of assuring 'every working man . . . in the nation safe and healthful working conditions.'"); see also Interview with Debra Jacobson, Counsel, Subcomm. on Investigations of the House Comm. on Energy and Commerce, in Washington, D.C. (October 16, 1986) (funding levels for NIOSH are inadequate to undertake new research); Occupational Safety and Health Improvements Act of 1980: Hearings on S. 2153, S. 1486, & S. 1572 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 231 (1980) (Statement of Elmer Chatak, AFL-CIO) (NIOSH lacks the research capabilities to function effectively as scientific advisor for OSHA).

A final managerial constraint is that agency administrators often quickly come and go. OSHA is a good example of this phenomenon. In its fifteen years of existence, no Assistant Secretary has served longer than about two years, with the exceptions of Eula Bingham (almost four years) and Thorne Auchter (three years).[33] It is probably not an accident that much of the agency's regulatory activity occurred during the Bingham and Auchter regimes.[34]

Staffing and leadership problems are permanent features of administrative government. OSHA, however, has three additional disadvantages in terms of management constraints as compared to FDA and EPA. It has more regulatory responsibilities, less scientific expertise, and more organizational burdens.

a. More regulatory responsibilities

OSHA has been given the responsibility to regulate any chemical that poses a significant hazard to workers and, to the

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[32] Washington Post, June 4, 1984, at D11, *reprinted at* R. PIERCE, S. SHAPIRO, P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, § 4.3.3, at 94 (1985) (citing a study by the Center for the Study of American Business of Washington University); *see* R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 127-28 (1983) (Reagan Administration has used "severe" budget cuts to restrain government regulation).

[33] The chronology of service is:

John Pendergast	May 86 - present	8 mos.
Vacant	July 85 - May 86	10 mos.
Robert Rowland	July 84 - July 85	1 yr.
Vacant	Mar. 84 - July 84	4 mos.
Thorne Auchter	Mar. 81 - Mar. 84	3 yrs.
Vacant	Dec. 80 - Mar. 81	3 mos.
Eula Bingham	Mar. 77 - Dec. 80	3 yrs. 9 mos.
Vacant	Jan. 77 - Mar. 77	3 mos.
Morton Corn	Dec. 75 - Jan. 77	1 yr. 1 mo.
Vacant	July 75 - Dec. 75	5 mos.
John Stender	Apr. 73 - July 75	2 yrs. 3 mos.
Vacant	Jan. 73 - Apr. 73	3 mos.
George Guenther	Apr. 71 - Jan. 73	1 yr. 9 mos.

[34] *Compare* PREVENTING INJURY, *supra* note 2, at 363-64 (chart of when regulatory standards were issued) *with* note 33, *supra* (chart of time of service of Assistant Secretaries.)

extent feasible, make every workplace safe.[35] Since there are thousands of chemicals used in industry, many of which may be dangerous, this responsibility is overwhelming.[36] Cognizant of this problem, Congress required OSHA in 1971 to adopt and enforce voluntary, consensus industry health and safety codes, including some 400 exposure ceilings for toxic substances set by the American Conference of Governmental Industrial Hygienists (ACGIH).[37] Congress also established a National Institute for Occupational Safety and Health (NIOSH), located in the Department of Health and Human Services, to develop recommendations, called criteria documents, for exposure limits for toxic materials.[38] Congress intended that OSHA would update the 1971 standards as it received recommendations from NIOSH; in the meantime workers would be protected under those standards.[39] This system, however, has not worked as intended.

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[35] 29 U.S.C. § 655(b)(5) (1982).

[36] *See* *Responses To Occupational Disease*, *supra* note 2, at 1232.

[37] *Id.* at 1257, *see* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety and Health*, 56 TEX. L. REV. 1329, 1388-91 (1978) (description of OSHA adoption of consensus standards). Safety codes were derived from the national consensus standards of the American National Standards Institute, the National Fire Protection Association, and some existing federal standards for maritime safety. Viscusi, *Reforming OSHA Regulation of Workplace Risks*, in REGULATORY REFORM: WHAT ACTUALLY HAPPENED 248 (L. Weiss & M. Klass eds. 1986) (cited hereinafter as *Reforming OSHA*). For a description of how voluntary consensus standards are created, see Hamilton, *supra* at 1338-68; Stokinger, *Modus Operandi of Threshold Committee of ACGIH*, 9 ANN. AM. CONF. OF IND. HYG. 133 (1984).

[38] *Id.* at 1257.

[39] *See* Interview with Bob Gombar, Venable, Baetjer, Howard & Civiletti, in Washington, D.C. (Oct. 30, 1986) (Congress erroneously expected that OSHA could quickly adopt new standards).

Because the system is so resource intensive, OSHA has been largely unable to update or supplement the 1971 standards.[40] In the meantime, industry groups, such as the ACGIH, have made hundreds of changes.[41] At the same time, NIOSH has recommended that OSHA change the 1971 exposure standards or create new standards for over a hundred chemicals.[42] Because OSHA has not been able to act on these recommendations, millions of workers face exposures that are in compliance with the 1971 OSHA standards, but which are considered dangerous by the newer ACGIH and NIOSH recommendations.[43]

OSHA has been ambivalent about admitting that its agenda of regulation is unmanageable. In 1983, an OSHA staff memorandum recommended that the agency stop working on the development of revised exposure level standards for 115 substances because of OSHA's limited staff and resources.[44] OSHA publicly denied it had any intention of abandoning that work, but it has taken no actions to finish it.[45]

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[40] Since 1971 OSHA has completed only eighteen rulemaking proceedings which adopted health standards for only twenty-five substances. See note 2 supra. It has also issued health standards for a cancer policy, for employee access to medical and exposure records, for occupational noise, and for hazard communications. Id. Since 1971, it has issued twenty-six safety standards. Id.

[41] For example, since publication of its 1968 recommendations, which were the ones adopted by OSHA in 1971, the ACGIH has lowered exposure limits for over 100 of the chemicals on the 1968 list, and it has established exposure limits for about 200 additional chemicals. Mendeloff, Regulatory Reform and OSHA, 5 J. POLICY ANALYSIS & MANAGEMENT 440, 442 (1986) (cited hereinafter as Regulatory Reform & OSHA); see, also, PREVENTING INJURY, supra note 2, at 257-260. Similar discrepancies exist for safety standards. For example, a 1976 Presidential Task Force estimated that the OSHA machine-guarding standards (which had been adopted in 1971) covered only fifteen percent of the types of machines in use. OSHA SAFETY REGULATION: REPORT OF THE PRESIDENTIAL TASK FORCE 14 (P. MacAvoy ed. 1977) [hereinafter cited as OSHA SAFETY REGULATION]. As of 1984, that standard had not yet been revised or expanded. PREVENTING INJURY, supra note 2, at 226.

[42] PREVENTING INJURY, supra note 2, at 258; Responses To Occupational Disease, supra note 2, at 1257.

[43] Regulatory Reform & OSHA, supra note 41, at 442.

[44] See Peterson, OSHA May Drop Standard-Setting Efforts, Washington Post, September 21, 1983, at A2.

With the breakdown of the congressional system to manage its workload, OSHA faces the difficult task of addressing a regulatory agenda perhaps larger and more complex than any other agency. Its efforts to do so are seriously constrained by the fact that OSHA has less access to scientific expertise than most agencies.

b. **Less scientific expertise**

OSHA is unique in its inability to manage many of the scientists doing work relevant to its regulatory process. NIOSH, which researches what chemicals and substances should be regulated,[46] is located in the Department of Health and Human Services,[47] a situation which creates serious coordination problems. For example, the most ambitious attempt by OSHA and NIOSH to cooperate to increase the effectiveness of OSHA regulation has ended in failure.[48] Further, OSHA officials have complained in the past that NIOSH criteria documents, which summarize the need for a regulation, contained insufficient information to allow OSHA to announce a rulemaking for the regulation.[49]

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[45] PREVENTING INJURY, _supra_ note 2, at 261. The last public hearing concerning any of the 115 substances, beryllium, was in 1977, and there has been no public activity on any of the others since 1975. _Id._

[46] _Responses To Occupational Disease_, _supra_ note 2, at 1256-57.

[47] _See_ _Occupational Diseases, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources_, 95th Cong., 1st Sess. 83 (1977) (Statement of Gregory Ahard, GAO) (Standards delayed because OSHA and NIOSH have limited teamwork, different priorities, and lack joint efforts at data collection).

[48] _See_ F. THOMPSON, HEALTH POLICY AND THE BUREAUCRACY: POLITICS AND IMPLEMENTATION 235 (1981). In the mid-1970s OSHA and NIOSH started actions to add requirements for exposure monitoring, medical surveillance, employee training and education, recordkeeping, or warning labels and signs for the consensus standard OSHA adopted in 1971. PREVENTING INJURY, _supra_ note 2, at 227. No regulatory actions were ever completed under that project. _Id._

Because NIOSH is not located within OSHA, the agency's access to scientific expertise, other than that of its own staff, is through consultants.[50] Other agencies, by comparison, can rely on an advisory committee system. FDA, for example, uses a large number of standing advisory committees to solicit advice concerning approval of new drugs.[51] This system gives FDA access to some of the leading scientists in the country.[52]

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[49] Telephone Interview with Grover Wrenn, President, Environ Corp. (Oct. 23, 1986) (former Director, Directorate of Health Standards, OSHA); F. THOMPSON, _supra_ note 48, at 235; PREVENTING INJURY, _supra_ note 2, at 261; T. GREENWOOD, KNOWLEDGE & DISCRETION IN GOVERNMENT REGULATION 118 (1984); COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, DELAYS IN SETTING WORKPLACE STANDARDS FOR CANCER-CAUSING AND OTHER DANGEROUS SUBSTANCES 32 (1977) (cited hereinafter as DELAYS IN SETTING STANDARDS).

[50] B. MINTZ, OSHA: HISTORY, LAW & POLICY 65 (1984); Interview with Ben Mintz, _supra_ note 16 (OSHA currently relies "heavily" on consultants).

[51] _See_ DEPARTMENT OF HEALTH, EDUCATION & WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, INTERIM REPORT: THE USE OF STANDING ADVISORY COMMITTEES BY THE BUREAU OF DRUGS OF FDA (1977) (cited hereinafter as USE OF STANDING ADVISORY COMMITTEES).

[52] _HEW FINAL REPORT_, _supra_ note 28, at 52. The report stated:

> Experts provide valuable advice on complex technical issues and assist the agency in deciding critical questions of scientific judgment . . . . [A]dvisory committees [also] offer FDA a dialogue with the nation's foremost experts in drug therapy. The Committees are thus an important source of peer review for proposed FDA decisions. For these reasons, use of advisory committees increases public and industry acceptance of FDA decisions and improves the credibility of the agency.

_Id_.

OSHA has the legal authority to appoint advisory committees,[53] but none have been appointed since 1976.[54] OSHA apparently has abandoned the committees because they imposed some administrative burdens,[55] because they have an unwieldy structure,[56] and because they did not give useful advice.[57] This decision, however, appears in retrospect to have been unwarranted. Although none of the previous problems are insurmountable,[58] the agency has forgone one type of scientific advice that has proven useful to other agencies.

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[53] 29 U.S.C. at § 565(b); see generally Ashford, The Role of Advisory Committees in Resolving Regulatory Issues Involving Science and Technology: Experience from OSHA and EPA, in LAW AND SCIENCE IN COLLABORATION 169 (J. Nyhart & M. Carrow eds. 1983). The agency also has a permanent, balanced advisory committee, known as the National Advisory Committee of Occupational Safety and Health (NACOSH). 29 U.S.C. at § 656(a).

[54] B. MINTZ, supra note 50, at 65; PREVENTING INJURY, supra note 2, at 353-64.

[55] Professor Mintz reports that no advisory committees were appointed in part because OSHA was bothered by the requirements for federal advisory committees established by OMB during the Carter Administration and by the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. § 7 (1982). B. MINTZ, supra note 50, at 65.

[56] Advisory committees are to have no more than fifteen persons and are to be balanced between "persons qualified by experience and affiliation to present the viewpoint of employers involved" and "persons similarly qualified to present the viewpoint of the workers involved." 29 U.S.C. at § 656(b). In addition, a committee must include at least one representative of a state health and safety agency and may include other persons "who are qualified by knowledge and experience to make a useful contribution," so long as the number of such persons does not exceed the number of representatives of federal and state agencies. Id.

[57] See T. GREENWOOD, supra note 49, at 130 (advisory meeting "did little more than provide a forum for the contending parties -- labor and employers -- to argue with each other."); Risk Assessment Research, 1984: Hearings on H.R. 4192 Before the Subcomm. on Natural Resources, Agriculture Research and Environment of the House Comm. on Science and Technology, 98th Cong., 2d Sess. 145 (1985) (Statement of Nicholas Ashford, MIT Center for Policy Alternatives) (OSHA advisory committees became tools for political manipulation).

[58] Methods to resolve OSHA's problems with advisory committees will be addressed in a forthcoming report for ACUS.

c. Additional organizational burdens

OSHA's proposed regulations must be reviewed by the Solicitor's Office and other officials of the Department of Labor (DOL). Since these offices are part of DOL, OSHA has no organizational authority to set deadlines or other management guidelines for them. Both agency employees[59] and others[60] report that decisionmaking delays in the Solicitor's Office and other DOL departments are difficult for OSHA to manage.[61]

Another type of management burden is created for OSHA by its own internal organization.[62] The promulgating of a standard requires input from a variety of disciplines including economists, industrial hygienists, and others.[63] These various professionals, however, are located in different departments, called "Directorates," in OSHA. Thus, the Directorate of Health Standards Programs performs risk assessment, the Directorate of Policy performs economic and feasibility analysis, and the Directorate of Technical Support assists in those functions.[64] Because the administrators of these Directorates are co-equal, no single Director has the authority to set deadlines or other management guidelines for the others. Unless the Assistant Secretary, or that person's staff, directly supervises day-to-day operations, no suitable mechanism exists to ensure accountability and dispute resolution. By comparison, FDA does not depend on the agency's Administrator to supervise day-to-day operations: a staff person is in charge of coordinating the efforts of the various disciplines.[65] Both agency employees[66] and others[67] report that the failure of previous OSHA administrators to address this problem has slowed decisionmaking for health standards.[68]

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[59] See, e.g., Interview with Frank White, Deputy Assistant Secretary, OSHA, in Washington, D.C. (Sept. 26, 1986) (coordination with offices in DOL presents problems); Interview with Barry White, Director, Directorate of Safety Standards Programs, in Washington, D.C. (September 26, 1986) (Solicitors Office can be "slowest link" in OSHA decisionmaking); Interview with John Martonik, Directorate of Health Standards, OSHA, in Washington, D.C. (September 26, 1986) (slippages in decisionmaking caused in DOL).

[60] See Occupational Safety and Health Improvements Act of 1980, supra note 31, at 1230 (Statement of Lane Kirkland, AFL-CIO) (timely progress in health standard development hampered by delays in Solicitor's office of DOL); Harter, In Search of OSHA, REGULATION, Sept./Oct., 1977, at 36 (It is "at best difficult" for OSHA to act because DOL officials "adopt their own schedules and priorities . . . .").

[61] See Part IIID infra (how Solicitor's Office slows OSHA regulation).

[62] Harter, supra note 60,. at 38 (organizational structure at OSHA is a "nightmare"); Interview with Steven Bokat, United States Chamber of Commerce, in Washington, D.C. (Sept. 9, 1986) (OSHA is "bureaucratically ponderous").

[63] See IA 1 supra (health and safety regulation requires risk, benefit, cost and feasibility analysis).

[64] T. McGARITY, supra note 24, at III 192-93.

The effects of the previous problems are cumulative. At the same time OSHA has a larger regulatory agenda than almost any other agency, it lacks scientific and administrative resources and management capability. OSHA's ability to regulate has also been constrained by its common and unique legal procedures.

3. **Legal Constraints**

All health and safety agencies must use some type of public process before a regulation can be promulgated. Although a few decisions are made through informal rulemaking,[69] many others are made by the more cumbersome hybrid rulemaking,[70] or, in a few cases, by the extremely cumbersome formal rulemaking.[71] In complicated cases, formal hearings can take months since parties have the opportunity to present evidence and cross-examine witnesses.[72] The use of such extensive procedures has been challenged on the ground they are unnecessary for the type of scientific and policy judgments made by health and safety agencies.[73] Nevertheless, the time spent during a hearing often is only a small part of the total time consumed by agency decisionmaking.[74]

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[65] See DEPARTMENT OF HEALTH, EDUCATION & WELFARE, REVIEW PANEL ON NEW DRUG REGULATION, INTERIM REPORT, FDA's REVIEW OF INITIAL IND SUBMISSIONS: A STUDY OF THE PROCESS FOR RESOLVING INTERNAL DIFFERENCES AND AN EVALUATION OF SCIENTIFIC JUDGMENTS 14-15 (1977) (interdisciplinary team, under the control of a supervising medical officer, evaluates the safety and efficacy of new drugs).

[66] See, e.g., Interview with John Martonik, supra note 59 (slippage is "inevitable" because of need "to coordinate with other units that may have their own problems"); Interview with Frank Frodyma, Director, Directorate of Policy, OSHA, in Washington, D.C. (Sept. 26, 1986) (No mechanism exists to force a "consensus" between those persons who must participate to promulgate a standard).

[67] DELAYS IN SETTING STANDARDS, supra note 49, at 23.

[68] See Part IIID infra (failure of OSHA Administrator to coordinate Directorates is a source of delay).

Agencies are also constrained by procedural and substantive requirements imposed by the courts. As a procedural matter, agencies have been given additional responsibilities concerning how they conduct a rulemaking proceeding.[75] As a substantive matter, agencies have been given additional responsibilities concerning how they justify any rules that they adopt.[76] Although whether these requirements produce better decisions is the subject of a lively debate,[77] there can be no dispute that agencies must now devote additional time and resources to the hearing process.[78] Moreover, because a few courts have misinterpreted these changes as inviting a highly critical scope of review,[79] agencies may take additional time to try to avoid reversal in those courts.[80]

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[69] See, e.g., 15 U.S.C. § 2605 (1982) (Toxic Substances Control Act); 42 U.S.C. § 6924 (1982) (Resource Conservation and Recovery Act).

[70] See, e.g., 33 U.S.C. § 1317(b)(1) (1982) (Clean Water Act); 42 U.S.C. § 7607(d) (1982) (Clean Air Act); 29 U.S.C. § 655(f) (1982) (OSHA). For a discussion of hybrid rulemaking, see ACUS, A Guide to Federal Agency Rulemaking (1983).

[71] See, e.g., 21 U.S.C. § 348(f), 355 (c)(1)(B) (Supp. II 1984) (FDA regulation of food additives and human drugs).

[72] Hamilton, Rulemaking On A Record by the Food and Drug Administration, 50 TEX. L. REV. 1132 (1972).

[73] See, e.g., Resolution of Scientific Policy Questions, supra note 8, at 750.

[74] This is the case at OSHA. See notes 84-85 infra and accompanying text.

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[75] The obligation to give "adequate notice", 5 U.S.C. § 553(b)(3) (1982), requires agencies to disclose fully their basis and purpose for a rule when it is proposed, and to hold a second hearing if that basis and purpose changes. See, e.g., United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d cir. 1977) (agency must give new notice if it significantly changes the data or methodology on which it will base a rule); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973) (agency must reveal in notice of rulemaking the data and methodologies on which it intends to rely). The obligation to give a "concise statement of basis and purpose" when the rule is promulgated, 5 U.S.C. § 553(c) (1982), requires agencies to respond to "cogent" comments made by during the hearing process. See A GUIDE TO FEDERAL AGENCY RULEMAKING, supra note 70, at 138-54; see, also, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 493 (D.C. Cir. 1973) (agency's failure to respond to public comments in its statement of basis and purpose ground for reversal); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Circ. 1968) (statement of basis and purpose must allow court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did").

[76] In Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), the Supreme Court held that agencies must have "adequate reasons" for their actions. An agency does not meet that requirement if it relied on factors that Congress did not intend it to consider, if it failed to consider "entirely" an important aspect of the problem it was resolving, or if it offered an explanation for its decision that ran counter to the evidence, or which was so implausible that it could not be explained as a product of a difference in view or of agency expertise. Id. at 43.

[77] Compare Shapiro & Levy, Heightened Scrutiny of the Fourth Branch: Separation of Powers and The Requirement of Adequate Reasons for Agency Decisions, 1987 DUKE L.J. 387 (favoring judicial review to enforce new requirements) with Pierce, The Role of Constitutional and Political Theory in Administrative Law, 64 TEX. L. REV. 469 (1985) (not favoring judicial review to enforce new requirements).

OSHA must engage in hybrid rulemaking in order to promulgate a health and safety standard.[81] By comparison, some agencies, like EPA, can promulgate some health standards by use of informal rulemaking.[82] Other agencies, like FDA, use a summary judgment procedure to avoid holding a formal hearing in many cases.[83] Nevertheless, the time OSHA spends in hybrid hearings is not the primary cause of delay. The time elapsed during hearings is only a small portion of the time elapsed during OSHA decisionmaking and judicial review.[84] For that reason, while streamlining the hearings would enhance OSHA's efficiency somewhat, it is not likely to aid the agency greatly in increasing its regulatory output.[85]

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[78] The first few OSHA health standards, for example, occupied only a few pages in the federal register, while recent standards have occupied hundreds of pages. *Compare* Standard For Exposure to Asbestos Dust, 37 Fed. Reg. 11,318 (1972); Standard For Carcinogens, 39 Fed. Reg. 3756 (1974); Standard for Exposure to Vinyl Chloride, 39 Fed. Reg. 35, 890 (1974) *with* Cotton Dust Fiber Standard, 43 Fed. Reg. 27,350 (1978); Standard for Lead, 43 Fed. Reg. 52,952 (1978); Identification, Classification and Regulation of Potential Occupational Carcinogens, 45 Fed. Reg. 5002 (1980).

[79] *See, e.g.*, Forging Industry Assoc. v. Secretary of Labor, 748 F.2d 210 (4th Cir. 1984) (OSHA's hearing conservation rule exceeds its statutory authority).

[80] This appears to be the situation at OSHA. *See* Part IIIG *infra*.

[81] 29 U.S.C. at § 655(b); *see generally* B. MINTZ, *supra* note 50, at 61-62.

[82] *See* note 69 *supra*.

[83] *See* 21 C.F.R. § 12.93 (1985); *see also* 10 C.F.R. § 2.749 (Nuclear Regulatory Commission's summary judgment rule); *see resolution of Scientific Policy Questions*, *supra* note 8, at 759-66 (discussing FDA summary judgment procedures).

A more serious problem is that the type of evidentiary burden imposed on OSHA appears to be greater than that of other agencies. The Administrative Procedure Act (APA) generally places the burden of proof on "the proponent of a rule."[86] At FDA and other licensing agencies, the proponent is the prospective licensee and that entity must establish that its product is acceptable. By comparison, at OSHA and other standard-setting agencies, the proponent is the agency and it must establish that a regulation is necessary.[87] This allocation has three important ramifications for OSHA. First, FDA can keep a product off the market in cases of scientific uncertainty, but

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[84] The following chart indicates the time elapsed for the various components of the process:

Standards	Hearing	Agency Decision-Making	Judicial Review	Entire Process
Asbestos	3 days	4 mos.	21 mos.	25 mos.
14 Carcinogens	3 days	11 mos.	10 mos.	21 mos.
Vinyl Chloride	6 days	5 mos.	2 mos.	7 mos.
Coke Oven Emissions	75 days	63 mos.	16 mos.	79 mos.
Benzene	22 days	61 mos.	28 mos.	49 mos.
DBCP	2 days	6 mos.	none	6 mos.
Arsenic	12 days	51 mos.	34 mos.	85 mos.
Lead	49 days	69 mos.	20 mos.	89 mos.
Cotton Fiber Dust	7 days	44 mos.	35 mos.	79 mos.
Acrylonitrile	11 days	18 mos.	none	18 mos.
Noise	24 days	100 mos.	46 mos.	146 mos.

See Responses to Occupational Disease, *supra* note 2, at 1305-09 (time elapsed for agency and judicial review except for noise standard); PREVENTING INJURY, *supra* note 2, at 363 (time elapsed for agency and judicial review for noise standard); McGarity, *OSHA's Generic Carcinogen Policy: Rulemaking Unclear Scientific and Legal Uncertainty*, in LAW AND SCIENCE IN COLLABORATION 78 (J. Nyhart & M. Carrow eds. 1983) (time elapsed for hearings).

[85] McGarity, *supra* note 84, at 77.

[86] 5 U.S.C. § 556(d) (1982).

[87] Huber, *supra* note 17, at 1033.

OSHA cannot regulate that risk until additional evidence is forthcoming.[88] Second, FDA requires the regulatee to develop the scientific information necessary for a decision, but OSHA has that responsibility.[89] Finally, firms regulated by FDA are harmed by regulatory delay, but firms regulated by OSHA benefit. Thus, OSHA enjoys less cooperation than it would if firms were required to obtain a license from the agency before they could act.[90]

Although the APA applies an "arbitrary and capricious" standard of review for most agencies, OSHA is required to support its rules with "substantial evidence."[91] As a result, it may have to produce more convincing evidence before it can regulate.[92] Because Congress assigned that burden of proof, OSHA decided to engage in hybrid rulemaking, rather than the more expeditious informal rulemaking used by other agencies.[93]

OSHA has also been affected by the manner in which the courts have defined its burden of proof. In 1980, OSHA undertook a bold move to speed regulation of carcinogens, but the Supreme Court in effect blocked this effort. The agency had adopted a generic cancer policy to avoid having to resolve the same scientific issues in every rulemaking proceeding.[94] The centerpiece of the policy was a decision to seek the lowest exposure feasible for any chemical that was carcinogenic in either animals or humans and to limit participants to certain types of evidence in their attempts to convince OSHA not to follow that generic policy.[95] The agency, however, withdrew these rules after the Supreme Court's decision in Industrial Union Department v. American Petroleum Institute (frequently referred to as the Benzene case).[96]

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[88] Id. at 1034.

[89] See note 18 supra and accompanying text.

[90] See notes 16-17 supra and accompanying text.

[91] Compare 5 U.S.C. § 706(2)(A) with 29 U.S.C. § 655(f) (1982).

[92] See R. PIERCE, S. SHAPIRO, & P. VERKUIL, supra note 32, at § 7.3. Some argue, however, there is little or no difference between how courts administer the two standards of review. Id.

[93] B. MINTZ, supra note 50, at 62.

[94] Final Rule, Identification, Classification and Regulation of Potential Occupational Carcinogens, 45 Fed. Reg. 5002 (1980) codified at 29 C.F.R. §§ 1990.101 - .152 (1982) (as amended). OSHA's rationale was that the "existing case-by-case approach, with its constant re-examination of already resolved scientific and policy issues, does not permit regulation of such substances in a timely and efficient manner." Id. at 5002.

In the Benzene case, the Court held that Congress had not delegated to OSHA the authority to decide how the proceed if sufficient information about how dangerous a chemical might be did not exist.[97] A plurality of the Court held that OSHA could promulgate a standard only if the agency first had proven that the change was "necessary and appropriate to remedy a significant risk of material health impairment." For the benzene standard under review, the plurality concluded that OSHA did not have any evidence to support a finding of "significant risk." They rejected OSHA's explanation that since no safe level of benzene exposure could be calculated, the only prudent course was to seek the lowest exposure level that was feasible.[98] In a later case, the entire Court confirmed that OSHA was required to prove that workers face a "significant risk" before it can promulgate a regulation limiting exposure to a chemical.[99]

After the Benzene case, it is unclear whether OSHA can use generic regulations that would avoid the time-consuming, case-by-case adversarial confrontations which have slowed agency rulemaking. If OSHA must hold a separate hearing on significant risk for every chemical that it regulates, the agency is unlikely to be able to act on very many of the hundreds of chemicals that may require regulation.[100]

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[95] 45 Fed. Reg. at 5283-84, 5286-87.

[96] 448 U.S. 607 (1980); see Final Rule, Identification, Classification and Regulation of Potential Occupational Carcinogens, Conforming Deletions, 46 Fed. Reg. 4889 (1981) (codified at 29 C.F.R. § 1990) (deletion of inconsistent provision).

[97] 448 U.S. at 652-53 (Act authorizes OSHA to promulgate health and safety standards only when agency can show, on the basis of substantial evidence, that significant risk of harm exists).

[98] Id. at 631-32, 635 n.38, 639-40, 667.

[99] See American Textile Mfgs. v. Donovan, 452 U.S. 490, 505 n.25 (1981) (OSHA determined that exposure to cotton dust presented a significant health hazard).

[100] The question of whether OSHA must hold a separate hearing will be addressed in a forthcoming reports for ACUS.

4. Political Constraints

One final constraint on agencies is the political nature of their work. Regulatory decisions are normally controversial because they affect Congress, the White House, and various interest groups.[101] Interest groups are affected because decisions cause a redistribution of wealth, often millions of dollars, from the regulated industry to consumers or other beneficiaries of regulation.[102] Congress and the White House are affected because agencies make choices about economic and social priorities in which elected officials have a great interest.[103] Agencies interact with these parties because each can influence the agency's ultimate success or failure.[104]

Regulatory decisions are also controversial because they involve difficult moral and philosophical choices. No society has sufficient resources to protect its citizens from all dangers. As a result, agencies inevitably are faced with "tragic choices" concerning which persons will be protected and which will not.[105] These choices must be informed by social values and they will affect the maintenance of those values.[106] Wide disagreement over which values should control these decisions makes them all the more difficult.[107]

During most of OSHA's existence, it has been embroiled in political controversy with industry, labor, the White House and Congress. Although all agencies have their share of such controversy, OSHA has more than the others.[108]

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[101] See Pierce & Shapiro, Political and Judicial Review of Agency Action, 59 TEX. L. REV. 1175 (1981).

[102] See Wilson, The Politics of Regulation, in THE POLITICS OF REGULATION 358-72 (J. Wilson, ed. 1980).

[103] See Pierce & Shapiro, supra note 102, at 1195-1200, 1211-13.

[104] See J. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY; THE POLITICS OF ENERGY 18-57 (1983).

[105] See G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1978).

[106] See M. DOUGLAS & A. WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS (1982).

[107] See Schroeder, Rights Against Risk, 86 COLUM. L. REV. 495 (1985).

OSHA is guaranteed an unusual amount of political controversy because its actions significantly affect both business and labor and most decisions favoring one group will disfavor the other. Attempts to reconcile business and labor are hampered by the long history of antagonism between those groups.[109] Thus, OSHA has almost continually been attacked by business for overregulation[110] and by labor and public interest groups for underregulation.[111] Because business and labor are affected, their allies in Congress are critical of the agency.[112] Finally, OSHA has been the subject of White House efforts to have agencies become more cost conscious.[113]

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[108] See G. WILSON, THE POLITICS OF SAFETY AND HEALTH: OCCUPATIONAL SAFETY & HEALTH IN THE UNITED STATES & BRITAIN 151 (1986) (The "dominant feature of the politics of safety and health in the USA has been conflict."); Interview with Dorothy Strunk, Counsel, House Comm. on Education and Labor, in Washington, D.C. (Oct. 31, 1986) (OSHA is the "most politicized agency in Washington").

[109] Levin, Politics and Polarity: The Limits of OSHA Reform, REGULATION, Nov./Dec. 1979, at 34 ("[T]he whole bitter nature of U.S. labor history -- the mutual distrust, management's desire to run its business with minimal interference, labor's belief that employers cannot be trusted to do 'right things' without a gun at their heads -- has been loaded on OSHA."); Thompson, Deregulation by the Bureaucracy: OSHA and the Augean Quest For Error Correction, 42 PUBLIC ADMIN. REV. 202, 205 (1982) (cited hereinafter as Augean Quest) (conflict between business and labor is particularly bitter because each group views agency decisions as "addressing values of the most fundamental importance" and each sees the other as "a long-term enemy of many of its most basic value commitments"); see S. KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL HEALTH AND SAFETY POLICY (1981) (American history of labor strife affects how OSHA can regulate).

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[110] OSHA was attacked in its early years for "Mickey Mouse standards" such as specifying split toilet seats or forbidding ice in drinking water. Kelman, Occupational Safety & Health, in THE POLITICS OF REGULATION 258 (J. Wilson ed. 1980). Most of these regulations were adopted pursuant to a Congressional order that the agency adopt as its own regulations existing, voluntary industry health and safety standards. See note 37 supra and accompanying text. OSHA adopted these regulations without culling out those that were silly thereby opening itself for political attack by business and their political allies. F. THOMPSON, supra note 48, at 231-35; Kelman, supra, at 259. In later years, business criticism focused on the high compliance costs imposed by OSHA health regulations. Kelman, supra note 89, at 259; see generally Szasz, Industrial Resistance to Occupational Safety and Health Legislation: 1971-1981, 32 SOCIAL PROBLEMS 104 (1984) (industry has resisted OSHA initiatives by seizing on popular support for deregulation of costly regulatory problems).

[111] See, e.g., J. CLAYBROOK, RETREAT FROM SAFETY: REAGAN'S ATTACK ON AMERICA'S HEALTH 113 (1984) (report by staff of Public Citizen) (OSHA has "diligently rolled back what health and safety protections it could on behalf of its business allies" by "backdoor administrative ploys and evasive rhetoric."); Bargmann, OSHA: The Urgency For Revival, AFL-CIO AMERICAN FEDERATION, June, 1977 ("urgent reform" of OSHA necessary for it to reach its "full potential").

[112] F. THOMPSON, supra note 48, at 229; Jones & Keiser, U.S. Senate Voting of Health and Safety Regulation: The Effects of Ideology and Interest-Group Orientations, 6 HEALTH POLICY 33 (1986); see Levin, Politics and Polarity: The Limits of OSHA Reform, REGULATION, Nov./Dec., 1979, at 33 (from 1973-76 Congress held over one hundred oversight hearings concerning OSHA); but see Telephone interview with Richard Lawson, Counsel, Senate Comm. on Labor (October 22, 1986) (No Senate oversight of OSHA from 1980 - 1986 to allow agency to solve its programs without interference).

The high level of controversy has had several debilitating effects on OSHA. First, Congress made so many political compromises when it passed legislation to establish OSHA that the agency lacked the organizational coherence, power, and resources necessary to do an effective job.[114] A good example of this problem, discussed earlier, was the decision to locate NIOSH in a different executive department.[115] Another example is that Congress subjected OSHA to a "substantial evidence" scope of review, rather than the "arbitrary and capricious" standard used under the APA to review agency rulemaking.[116] Second, almost every health decision has been challenged in the courts.[117] As a result, OSHA engages in a lengthy preparation process in order to defend itself.[118] Third, the agency has lacked sufficient legitimacy to gain popular support for its actions. As a result, it has very little political protection from its critics.[119] Finally, industry and labor have vigorously blocked consideration of legislative reforms that might make OSHA's job easier. Each has been too fearful that the other could obtain congressional approval of reforms disadvantageous to itself.[120]

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[113] F. THOMPSON, *supra* note 48, at 225-26. Some have claimed that health regulations have been a particular target of the Reagan Administration. *See, e.g.*, HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON ENERGY AND COMMERCE, OMB REVIEW OF CDC RESEARCH: IMPACT OF THE PAPERWORK REDUCTION ACT, H. Rep. No. 99-MM, 99th Cong., 2d Sess. (1986) (OMB has discriminated against the collection of data for environmental and health regulations.) Other Presidents, however, have also failed to support OSHA or have attempted to limit its actions. *See* G. WILSON, *supra* note 108, at 161 (description of anti-OSHA efforts of Presidents Nixon, Ford and Carter). Whether or not OSHA has been singled out, OMB review of regulations have become highly controversial. *See* Morrison, *OMB Interference With Agency Rulemaking: The Wrong Way To Write Regulations*, 99 HARV. L. REV. 1059 (1986).

[114] Levin, *supra* note 112, at 36-37; Telephone Interview with Sy Holtzman, Deputy Staff Director, Subcomm. on Health of the House Comm. on Education & Labor (Oct. 21, 1986).

[115] *See* notes 46-48 *supra* and accompanying text.

[116] *See* Associated Industries v. Department of Labor, 487 F.2d 342, 347-50 (2nd Cir. 1973) ("substantial evidence" standard result of Congressional compromise).

[117] Business has sought review for all but four of OSHA's eighteen health standards. *See* PREVENTING INJURY, *supra* note 2, at 363; *Responses To Occupational Disease*, *supra* note 2, at 1305-09. Moreover, labor and public interest groups have continually sued OSHA for failure to issue regulations. *See* Part IIA2 *infra*; *Responses To Occupational Disease*, *supra* note 2, at 1263.

B. The Possibility of Reform

In light of the previously discussed difficulties, it is remarkable that OSHA has accomplished as much as it has. Nevertheless, it is clear that much remains to be done. Knowledgeable observers are generally pessimistic about the possibility of reform at OSHA and even optimists are rather guarded in their hopes.

Great caution is certainly appropriate. The previous discussion reveals the complexity of problems faced by OSHA. Moreover, reform of an ongoing agency is actually more difficult than building a regulatory system from the ground up. Revisions will be opposed not only by those who perceive they will be disadvantaged, but even by those who might benefit because they prefer the "devil they know" to any future uncertainty.[121] Finally, groups representing labor, management, physicians, other health professions, and public interest organizations perceive the need for change according to their professional orientations. Because each group differs in orientation, OSHA reform is "contested terrain" between them.[122]

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[118] See Part IIIG infra and accompanying text. Moreover, in the late 1970s all OSHA decisionmaking was brought to a halt while OSHA awaited the outcome of a series of important court cases. Viscusi, The Status of OSHA Reform: A Comment on Mendelhoff's Proposals, 5 J. POLICY ANALYSIS & MANAGEMENT 469, 471 (1986).

[119] See Levin, Politics and Polarity: The Limits of OSHA Reform, REGULATION, Nov./Dec., 1979, at 39 (public's commitment to job safety and health does not run deep and wide enough to make the subject a top national priority); Harter, supra note 60, at 34 (OSHA has little political support). By comparison, agencies like FDA enjoy broad popular support because they resolved years ago the type of intense political problems that currently plague OSHA. Telephone Interview with Donald McLearn, Special Asst. to the Director, Bureau of Drugs, FDA (Oct. 16, 1986).

[120] See Interview with Dorothy Strunk, supra note 108 (No constituency for legislative reform because both labor and industry perceive they would be worse off); Telephone interview with Sy Holtzman, supra note 114 (Oct. 21, 1986) (OSHA supporters "afraid" that if new legislation was considered, the agency would be "substantially weakened").

With these realities in mind, this report examines two types of possible reforms. Part II considers the importance and advantages of a better priority-setting system at OSHA. Part III evaluates new methods of management.

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[121] See Harter, supra note 60, at 38 ("largest obstacle" to reform at OSHA is the opposition of those with a vested interest in the status quo); Levin, supra note 112, at 39 (Those who have learned to use present system may prefer "the devil they know").

[122] Interview with Karl Kronenbush, Office of Technology Assessment, in Washington, D.C. (Oct. 31, 1986).

II. Prioritization.

If OSHA continues to do business as it has in the past, it has sufficient resources to pursue actively about 15-20 major rulemaking efforts at any given moment.[123] Further, given current resource constraints and a 4-8 year gestation period for most rules, OSHA has the capacity to take on only about 2-5 new projects in any single year. How OSHA chooses new projects from among the thousands of conditions that create potentially hazardous workplaces is a matter of no small importance to the agency, the regulated industries, and workers. Each new Administration at OSHA seems to revisit this question at least once.[124]

In 1983, then-Assistant Secretary Auchter told a House subcommittee that OSHA rulemaking had been "a random process" in which "priorities were constantly re-juggled and whoever screamed the loudest got the action."[125] That characterization applies equally well in 1987. There are presently at least nine sources of rulemaking initiatives that vie for OSHA's attention as it attempts to establish a rulemaking agenda: OSHA's own systematic prioritization efforts; worker and consumer group petitions; congressional demands for action; pressure from the White House and OMB; referrals from EPA pursuant to The Toxic Substances Control Act; NIOSH criteria documents; private standard-setting agencies like ACGIH and ANSI; information collected from the field; and developments in the states and other countries.

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[123] The Health Standards Directorate has approximately 33 professionals to devote to rulemaking activities. Martonik Interview, supra note 59. That Directorate is currently working on about 17-18 projects, but many of these are small and some are winding down. The Safety Standards Directorate has approximately 20 effective professionals. B. White Interview, supra note 59. One long-time health scientist in the Health Standards Directorate estimates that at current staffing levels, OSHA is only capable of working effectively on six or seven standards at any one time. Telephone interview with Edward Stein, Directorate of Health Standards Programs, OSHA (October 21, 1986). A member of the Policy Directorate put the number at 9-10 health standards. Telephone Interview with Larry Braslow, Supervising Economist, Directorate of Policy, OSHA (October 24, 1986).

[124] Wrenn Interview, supra note 49.

[125] BNA Occupational Safety and Health Reporter, May 5, 1983, at 1043. See Delays in Setting Standards, supra note 49 (relating inability of NIOSH and OSHA to set priorities).

Ideally, OSHA should channel all of these sources into its own agenda-setting mechanism to establish a realistic set of priorities for the near term. In prioritizing projects related to safety standards, OSHA comes close to achieving this ideal. Most of OSHA's safety standard work consists of reviewing and updating existing standards.[126] The agency agreed several years ago to review all of its existing safety standards within ten years and to set new standards where the old ones were out of date. The Safety Standards Directorate has been methodically proceeding down a list of existing standards. When a need for a new standard arises, as in the case of grain elevators and Bhopal-like chemical leaks, the Directorate simply amends its priorities sub silentio to allow the new project to take the place of some pending project.[127]

The situation is starkly different for health standards. There are literally thousands of substances in American workplaces that are regulated, if at all, only by the consensus standards that OSHA promulgated in 1971. Most experts agree that the old consensus standards, without more, are not adequate to provide safe and healthful workplaces, and OSHA acknowledges that it has much work to do in the health area. But OSHA has no agenda-setting process at all for health standards. In reality, its priorities are determined in an ad hoc fashion by outsiders. Virtually every knowledgeable observer of the OSHA rulemaking process, from both inside and outside the agency, agrees that this is a sorry state of affairs that is badly in need of correction. There is less agreement, however, on how OSHA should go about regaining control over its own agenda.[128]

A. Sources of agency priorities.

1. Systematic Agency Priority-Setting.

OSHA's one attempt to rank priorities systematically was its 1979 carcinogen policy, which contained a scheme for ranking substances that showed indications of carcinogenicity. The agency screened about 200 substances and attempted to rank them according to exposure, quality of data, and potency.[129] This effort generated a great deal of controversy among regulatees, and it was abandoned after the Fifth Circuit stayed the Carcinogen Policy. According to one observer of this effort, its candid, highly public nature spelled its doom. Once the agency placed individual substances on the list, employers who used those substances were willing to expend substantial resources challenging the prioritization effort. Given the large uncertainties in setting priorities for carcinogens, it was relatively easy to make plausible arguments that OSHA had misranked the chemicals on the list. OSHA ultimately abandoned the attempt.

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[126] B. White Interview, supra note 59.

[127] B. White Interview, supra note 59; Telephone interview with George Henshel, Department of Labor, Office of the Solicitor (October 28, 1986).

[128] Because prioritization is largely a problem for health standards, the following discussion will focus on those standards and generally ignore safety standards.

The carcinogen policy experience should not, however, cause OSHA to abandon systematic priority-setting; nor is it a reason to hide it behind closed doors. As we shall see later in this section of the Report, the agency can systematically set priorities if the reviewing courts are educated about the difficulties of setting priorities in areas of great uncertainty and if the agency adopts a process that will allow it to make prioritization decisions without becoming paralyzed by the predictable complaints of economically interested entities. Nevertheless, the vehemence with which employers rejected OSHA's first attempt to draft a priorities list has made the agency chary of public priority-setting, and it has not in the intervening years attempted any similar projects.

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[129] 26 C.F.R. §§1990, 131-33, 45 Fed. Reg. 5002 (1980). Telephone Interview with Charles Gordon, Department of Labor, Office of the Solicitor (October 23, 1986); Stein Interview, supra note 123. According to the policy OSHA was to take the following factors into account in ranking candidates for regulation:

> (1) The estimated number of workers exposed;
> (2) The estimated levels of human exposure;
> (3) The levels of exposure to the substance which have been reported to cause an increased incidence of neoplasms in exposed humans, animals or both;
> (4) The extent to which regulatory action could reduce not only risks of contracting cancer but also other occupational and environmental health hazards;
> (5) Whether the molecular structure of the substance is similar to the molecular structure of another substance which meets the definition of a potential occupational carcinogen;
> (6) Whether there are substitutes that pose a lower risk of cancer or other serious human health problems, or available evidence otherwise suggests that the social and economic costs of regulation would be small; and
> (7) OSHA will also consider its responsibilities for dealing with other health and safety hazards and will consider the actions being taken or planned by other governmental agencies in dealing with the same or similar health and safety hazards.

26 C.F.R. § 1990.132 (1986).

2. Rulemaking Petitions.

The most frequent source of OSHA rulemaking initiatives during the last five years has been petitions from unions and public interest groups. In the typical pattern, a new scientific study indicating that a common workplace substance may be hazardous is reported widely in the press.[130] An agency spokesman says that the agency is concerned and is looking into the matter. The Assistant Secretary instructs the Health Standards Directorate to study the issue, and the matter quickly loses its previous visibility.

Months or years pass without a formal agency response until a union or public interest group petitions the agency (usually with great fanfare) to set an emergency temporary standard and promulgate a notice of proposed rulemaking (NPRM). The agency agrees to consider the matter by a certain date, and the petition is referred to the staffer who was originally assigned the issue. The matter then assumes a much higher priority for that staffer, who now pulls together an ad hoc work group to prepare the agency's response to the petition.

The deadline passes. After several months, the petitioner (again with much fanfare) files suit in a district court demanding that the agency respond to the petition within a reasonable time. The agency responds by denying the allegation that it has unreasonably delayed things, but since it has only promulgated approximately two major rules in the last six years, it recognizes that it will have a difficult time demonstrating that it is really too busy. It therefore attaches to its response a proposed schedule for completing its consideration of the petition. In deference to the agency, the court accepts the agency's response, but retains jurisdiction with a warning that the court will not hesitate to intervene to correct any further delays.

Further delays occur, and the agency slips from the court-adopted schedule. The petitioner returns to court and secures a court order requiring OSHA to promulgate the proposed rule by a certain date or risk being held in contempt of court.

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[130] The following description is intended to raise the general problems of OSHA's response to petitions. Although it may not precisely describe the process of responding to any particular petition, it is a fairly accurate composite description of several petitions, including asbestos, benzene, ethylene oxide, field sanitation, and formaldehyde.

Finally, the agency rushes out with a rule just before the final court-ordered deadline.

Perhaps the greatest advantage of the outside petition as an agenda-setting device is its potential to hold the agency accountable to its beneficiaries. Absent the petition tool, the agency feels greater pressure from regulatees. Since virtually every OSHA health standard is challenged in court, the agency is understandably reluctant to initiate a rulemaking action until it is very certain that it can create an administrative record capable of withstanding careful judicial scrutiny. Without some pressure emanating from regulatory beneficiaries, the agency will be very selective in choosing rulemaking topics. The petition device with the underlying threat of a "bureaucracy forcing" lawsuit reminds the agency that delay in initiating rulemaking also has its costs, not the least of which is the agency's loss of control over its own agenda. Many representatives of beneficiary groups firmly believe that if it were not for the threat of a lawsuit, OSHA would never decide to take up difficult and controversial projects.[131] And a surprising number of health professionals in the Health Standards Directorate agree with this assessment.

Another argument favoring the petition device is that workers may be in a better position to understand workplace risks than the agency professionals and contractors. Adhering to the principle that the squeaky wheel is most in need of oil, some agency officials are content to let beneficiaries play a very large role in setting the agency's agenda. The necessary corollary is that workplaces about which the agency does not receive petitions must be reasonably safe.

Finally, as a practical matter, in our pluralistic participatory democracy, it is not politically realistic to maintain that beneficiary groups should not play a strong role in agency agenda-setting.[132] The traditional argument that the agency is the best representative of beneficiary interests is no longer tenable in a post-Nader era. The agency may be in the best position to balance the competing interests of industry and worker, but OSHA is clearly not an agent for labor alone.

To maintain that beneficiary groups should play a role in agency agenda-setting through the petition process is not, however, to conclude that beneficiary groups should dominate that process. Although few would argue that past petitions have addressed unimportant issues, it is in many cases debatable whether beneficiaries understand workplace hazards better than agency professionals, especially when those hazards are subtle and chronic in nature. No individual petitioner is likely to have the expertise necessary to assess comparative risks across a broad spectrum of occupations to determine which workers are most in need of protection. Pitting beneficiary groups against one another for access to limited agency rulemaking resources will not necessarily result in a set of priorities that has the potential to provide the greatest degree of protection to workers in general. Indeed, relying exclusively on petitions to set agency priorities would probably force the agency to give less attention to the workplace conditions of unorganized workers.[133]

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[131] Telephone Interview with Margaret Seminario, Assistant Director, Department of Occupational Safety, Health, and Social Security, AFL-CIO (November 4, 1986).

[132] See generally, Luneburg, Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement, Report to the Administrative Conference of the United States (1986).

In sum, while it is obvious that any agenda-setting mechanism that OSHA develops should be capable of seriously addressing outside petitions, that device should also be capable of rejecting such petitions. Yet OSHA cannot credibly reject a petition until it is in a position to say to the petitioner: "Your petition has merits, and we will fully investigate the hazards that you bring to our attention. But for now other higher priority matters command our full attention." And the agency cannot credibly make this statement until it can point to some consistent system for ranking potential agency initiatives and until it can demonstrate that it is expeditiously addressing projects on its current agenda.[134] OSHA presently lacks a prioritization plan, and it tends to study petitions interminably for lack of any way to decide whether the topic the petition addresses is more important than projects that it is currently pursuing. This paralysis persists until the agency is forced to respond to a judicial challenge to its indecision. Lacking a priority-setting process, OSHA does not have a credible response to ad hoc petitioners in such challenges.

It is only the good sense and self-restraint of petitioners that has prevented OSHA from becoming overwhelmed with petitions, each of which appears meritorious when considered in a vacuum. But a recent increase in the frequency of petitions and the recent surge in referrals from EPA suggest that the agency must act quickly to protect its limited rulemaking resources.[135] OSHA badly needs a process for setting priorities that is responsive to outside petitions, but not driven by them.

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[133] Telephone interview with Dr. Imogene E. Sevin, Directorate of Health Standards Programs, OSHA (November 3/5, 1986); Henshel Interview, supra note 127. The history of the efforts of relatively poorly organized agricultural workers over the last ten years to persuade OSHA to promulgate a field sanitation standard, however, argues against the conclusion that less organized workers will have less access to the agenda setting process.

[134] Telephone interview with Arthur Sampson, Kirkland & Ellis (October 24, 1986).

3. Congressional Pressure

While the threat of being held in contempt of court is an undoubted spur to administrative activity, the threat of being on the receiving end of a critical congressional investigation can prove equally motivating. For example, OSHA's efforts to regulate ethylene dibromide (EDB) were in large part a result of congressional pressure. The studies showing that EDB caused cancer in laboratory animals had been around for years when state officials began to detect EDB residues in food. Although residues in food were not directly relevant to worker health, investigations soon revealed that some workers were being exposed to much higher levels of EDB than consumers of food. Congressional pressure soon mounted for OSHA to do something about worker exposure to EDB, and OSHA reacted by giving EDB a much higher priority.

Congressional pressure can also motivate the agency to give a rulemaking initiative less priority than it might otherwise have. For example, a safety initiative for the oil and gas industry has been percolating within OSHA for several years, and many safety experts agree that it could yield significant health benefits. Most agency officials, however, believe that as long as the oil and gas industry continues its current decline, it will not be politically feasible to promulgate an oil and gas safety standard.

Like court action, congressional interest usually originates from complaints of beneficiary groups about agency inaction. In some cases, however, congressional committees are more successful at probing the reasons for agency inaction than courts. Because they often have access to disgruntled agency staff, congressional committees may not accept agency excuses at face value. In addition, a congressional committee is not as likely as a district court to be persuaded by the agency's good faith claims and its offer to set itself on a mandatory schedule. Congressional investigations may attract more media attention than judicial actions. Finally, unlike the interest groups that ask courts to set the agency's agenda, Congress can legitimately claim to represent the broad public interest.[136]

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[135] The experience of the Consumer Product Safety Commission (CPSC) under a now-defunct provision of the Consumer Product Safety Act suggests that inundation is a very real possibility. Section 10(e) of the Act, 15 U.S.C. §2059(e) (repealed 1981), required CPSC to respond to petitions within 120 days. Failure to respond could result in a bureaucracy-forcing lawsuit in district court in which the question whether the product's risks crossed the statutory threshold was tried *de novo*. In its first three years CPSC was inundated with two hundred petitions. Schwartz, The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade, 51 Geo. Wash. L. Rev. 32, 47 (1982).

One significant disadvantage of congressional pressure as an agenda-setting mechanism is its highly political nature. Some congressmen may not be as concerned with inducing OSHA to action as they are with attracting media attention to themselves and in criticizing the opposing party. Most knowledgeable congressmen and staff know that scientific rulemaking is an arduous process that should not lightly be undertaken. But sometimes the opportunity to score easy political points at the agency's expense proves irresistible.

Congress also lacks sufficient technical expertise to be able to divine which rulemaking topics should have precedence over others. More than most institutions, Congress is susceptible to the "chemical-of-the-month syndrome," under which the agency is forced to undertake intense scrutiny of new topics on an ad hoc basis as new evidence reaches the media. While this faddish approach to prioritization may satisfy the press and particular interest groups, it is not likely to meet a neutral scientist's worst-first test. The agency may find itself chasing after high-visibility, low-risk subjects, while low-visibility, high-risk topics go unaddressed.[137]

In the highly political atmosphere in which a modern regulatory agency finds itself, political considerations must necessarily play a role in setting its priorities. But OSHA's statutory goals are not best advanced by an agency that is blown by the political winds without any moorings of its own. OSHA will always face strong congressional pressure to undertake particular rulemaking activities and to resist others, and in a democratic society the agency should be responsive to those pressures. But this does not imply that OSHA should not have its own agenda. While the agency might well craft a device for elevating particularly "hot" issues to the top of its agenda, it must also have a mechanism for resisting congressional pressure when sound analysis reveals that OSHA's severely limited resources could better be used in other efforts.

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[136] This argument in favor of congressional pressure must, however, be qualified by the observation that a single subcommittee is not necessarily representative of a broad public consensus. Indeed, congressmen often select committees because of the interests of particular constituent groups. Nevertheless, congressional investigations probably do represent a broader constituency than the interest groups that file bureaucracy-forcing lawsuits.

[137] Pierce and Shapiro, supra note 35, at 1201; Vladeck Interview, supra note 17.

4. White House and OMB Pressure.

OSHA is an executive agency; its leadership serves at the pleasure of the President. Like Congress, the White House is sensitive to political constituencies, and like congressional pressure, presidential pressure can be highly motivating. For example, although OSHA had, after many years of intense effort, promulgated standards for lead and cotton dust and had successfully fended off most court challenges, the new Administration in 1981 developed a "hit list" of regulations that it wanted the agency to re-examine that included the lead and cotton dust standards. OSHA then devoted substantial resources over the next few years to an intense revisiting of the same issues that it had only very recently studied.[138] The efforts did not, in the final analysis, result in any significant weakening of the existing standards.[139]

White House pressure can also induce OSHA to promulgate new rules. Although OMB initially demanded that OSHA withdraw a proposed rule requiring certain employers to inform employees of workplace hazards after it was rushed to the Federal Register in the waning hours of the Carter Administration, business groups began to urge the White House to pressure OSHA to promulgate a new rule that would preempt state and local regulations that were blossoming around the country. OSHA reacted to this pressure by proposing a revised hazard identification regulation that has now become a final rule.[140] Similarly, under OMB pressure, OSHA promulgated a standard that eliminated a burdensome recordkeeping requirement in a brief 12-month period.[141]

OMB can also affect OSHA's priorities from the opposite direction by discouraging the agency from putting particular issues on its rulemaking agenda. Executive Order 12498 requires that virtually all significant rulemaking initiatives appear in the Administration's Regulatory Program. In practice, to place an item in the Regulatory Program, an agency must persuade OMB of the project's virtue. If OMB does not agree, the item does not appear on the Administration's agenda and, under the terms of the Executive Order, it may not be placed on the agency's own agenda. For example, one of the reasons that OSHA's recent attempt to formalize a standard to address Bhopal-like chemical leaks has not gone forward is OMB's resistence to placing the project on the Administration's agenda.[142]

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[138] Gordon Interview, supra note 129; Telephone interview with Susan Harwood, Health Scientist, Office of Risk Assessment, Directorate of Health Standards Programs, OSHA (October 21, 1986).

[139] In 1985, OSHA promulgated some weakening revisions to the cotton dust standard, 50 F.R. 51120 (1985), but they did not substantially change the standard.

[140] 48 Fed. Reg. 53295 (1983).

[141] F. White Interview, supra note 59.

Presidential pressure has many of the same advantages and disadvantages of congressional pressure, and they will not be repeated here. One significant difference, however, is that White House and OMB pressure has been considerably less visible than congressional pressure. While congressmen score political points through high visibility investigations, the White House can score political points through quiet intervention into ongoing rulemaking activities.[143] Moreover, there is some reason to believe that OMB and White House pressure originates outside of the government. For example, the Vice President's Task Force's "hit list" was largely based on suggestions from the regulated industries.

It is somewhat more controversial to suggest that OSHA should have a mechanism for responding to pressure from the White House, which, after all, represents the agency's ultimate boss. Yet if the agency's goal is truly to provide the most protection to workers with the least consumption of industry and administrative resources, it must be prepared to tell OMB that other matters command its full attention just as it must be prepared to give the same bad news to congressional committees. At the very least OSHA must be prepared to explain to Congress and possibly to reviewing courts why topics forced upon it by OMB or the White House should command greater attention than the topics identified by petitioners, congressional staff and EPA.

In sum, while the intensity of congressional and presidential desires should be a factor in OSHA's ranking system, it needs a system that responds to other factors, if for no other reason than the fact that congressional and presidential preferences are often quite inconsistent.

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[142] Telephone Interview with Mike Wright, Director of Safety and Health, United Steelworkers (October 24, 1986).

[143] See, e.g., Houck, President X and the New (Approved) Decisionmaking, 36 Am. U. L. Rev. 1 (1987); House Comm. on Environment and Public Works, 99th Cong., 2d Sess., Office of Management and Budget Influence on Agency Regulations (Comm. Print 1986).

5. TSCA Referrals.

The Toxic Substances Control Act empowers the Environmental Protection Agency to require manufactures of new and existing chemicals to test those chemicals for toxicity and to submit information concerning human exposure to those chemicals. Upon receiving information indicating that a chemical or mixture of chemicals poses an unreasonable risk to humans or the environment, EPA may issue a rule regulating the production, distribution and use of the chemical. Alternatively, under section 9 of TSCA, if there is a reasonable basis to conclude that a chemical will present an unreasonable risk and if EPA determines that "such risk may be prevented or reduced to a sufficient extent by action" taken by another agency, EPA may submit a report to that agency detailing the risk. The report must request the receiving agency to determine if the risk may be reduced to a sufficient extent by that agency and, if so, to issue an order "declaring whether or not the activity . . . presents such risk" and to respond to EPA within a deadline set by EPA that is greater than 90 days.[144]

At one time EPA entertained the possibility of assuming a major role in regulating workplace hazards, because its authority to regulate specific aspects of a chemical's use in the workplace is in many ways broader than OSHA's authority.[145] But under substantial prodding by OMB, EPA has decided to make greater use of its section 9 referral authority, rather than to develop a worker protection program of its own.[146] As a consequence, OSHA has received during the last year-and-a-half more of these "TSCA referrals" than in the past.[147] Indeed, some officials in OSHA and EPA have suggested that a TSCA referral is a convenient way for EPA, which has only promulgated two substantive regulations in the ten year lifetime of TSCA, to "punt" difficult regulatory issues to OSHA.

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[144] 15 U.S.C. § 2608.

[145] For example, EPA can ban a chemical from a workplace. 15 U.S.C. § 2605(a)(2)(A). OSHA could ban a chemical only if that would be "feasible."

[146] Seminario Interview, supra note 131.

[147] During the last year-and-a-half, OSHA has received three TSCA referrals from EPA. Telephone Interview with John Martonik, Deputy Director, Health Standards Directorate, OSHA, February 5, 1987. OSHA could no doubt absorb this small number of referrals into its informal priority-setting system. However, EPA has only recently begun referring matters to OSHA, rather than dealing with them under its TSCA authority, and there is a great potential for many more referrals in the near future. Id.

OHSA and EPA have recently entered into a formal Memorandum of Understanding (MOU) that addresses the interaction between EPA and OSHA during TSCA referrals. The MOU requires EPA to send OSHA a list of substances being considered for TSCA referral twice per year. Within a month after OSHA's acknowledgment of receipt of the notice, EPA and OSHA employees must meet to coordinate information on the listed substances. EPA must inform OSHA within 48 hours after sending a report to the Federal Register. After the Report is published, personnel from both agencies must meet again to coordinate information on the chemical that is the subject of the report, and OSHA must give EPA 48 hours notice prior to publishing its response in the Federal Register.[148] Although the MOU provides for extensive coordination between the two agencies, OSHA has no power to veto a TSCA referral if the Administrator of EPA exercises his discretion to publish a report in the Federal Register. At best, OSHA is given an opportunity to persuade EPA not to send the referral. Nowhere in the agreement is there an indication that OSHA's current workload is an appropriate factor to be considered in deciding whether or not a report should be published. While the MOU represents a commendable attempt to ensure the coordination of information relevant to the decisions of both agencies, it will stem the flow of TSCA referrals only to the extent that OSHA staff can persuade EPA staff that workplace risks are better addressed by EPA's TSCA authorities.

Despite the formal interagency arrangement with EPA, OSHA does not currently have a formal internal mechanism for responding to TSCA referrals. In practice, a project officer in the Health Standards Directorate is assigned the task of preparing a draft response, which may range from doing nothing to preparing a Notice of Proposed Rulemaking.[149] As a practical matter, this job can pull the project officer away from other rulemaking responsibilities.[150] Many OHSA officials are concerned that if a large number of referrals continue to flow from EPA to OSHA, EPA will soon be setting OSHA's rulemaking agenda.[151]

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[148] Memorandum of Understanding Between the Environmental Protection Agency and the Department of Labor, EPA Agreement No. PW 16931704-01-0 (Feb. 6, 1986).

[149] Martonik Interview, supra note 59; Stein interview, supra note 123.

[150] Stein interview, supra note 123.

[151] Martonik interview, supra note 59.

TSCA referral has at least two distinct advantages. First, EPA is in a far better position to acquire some kinds of information on chemicals that might pose risks to workers. While both EPA and OSHA look to NIOSH for compilations of existing health effects studies on chemicals, EPA has the additional power to require manufacturers to conduct additional studies.[152] Second, EPA has a much larger staff of toxicologists to evaluate epidemiological and animal studies and perform risk assessments.[153]

There are, however, several disadvantages to TSCA referral. EPA is in no better position than OSHA to determine workplace exposures, and EPA can be of no help at all on the questions of the existence and feasibility of control technologies.[154] Since EPA does not have special expertise in workplace exposure and in control technologies, EPA can refer to OSHA chemicals that may pose relatively trivial workplace risks.[155] Even when OSHA personnel know that there is very little worker exposure to a referred chemical, the agency may still be required to prepare a formal response to EPA. This implicitly gives the referred chemical a high priority, at least for a brief time while OSHA prepares its response.

A second disadvantage is that EPA may use TSCA referral as a convenient device for avoiding hard questions. If so, then the TSCA referrals that OSHA receives are likely to be controversial and resource-intensive. Unlike rulemaking petitions, where every petition is supported by some interest group that is usually willing to gather information and provide pressure to proceed, there may be no organized constituency behind TSCA referrals. EPA can simply dump the matter in OSHA's lap and walk away. There is, in addition, some evidence to suggest that the Office of Management and Budget has sought referrals to OSHA as a vehicle for avoiding some of the more stringent regulatory tools available to EPA that are unavailable to OSHA, thus making OSHA's job all the more difficult.[156]

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[152] 15 U.S.C. §2603.

[153] Seminario interview, supra note 131.

[154] Seminario interview, supra note 131.

[155] Seminario Interview, supra note 131; Martonik interview, supra note 59. The February, 1986 Memorandum of Understanding between EPA and OSHA, supra note 148, may reduce this threat to some extent.

[156] EPA's Asbestos Regulations, Report on a Case Study on OMB Interference in Agency Rulemaking by the Subcommittee on

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Third, TSCA referral can duplicate OSHA's own efforts and those of NIOSH. For example, OSHA has long been examining the health effects of asbestos. EPA's activities were largely duplicative of OSHA's efforts, insofar as they related to workers, and the referral of asbestos (a referral that was later withdrawn) was not especially useful to either agency.[157] Although it is too soon to tell whether the formal Memorandum of Understanding between EPA and OSHA for TSCA referrals has eliminated this potential for duplication, [158] it should go a long way toward conserving the informational resources of both agencies.

While TSCA referral can be beneficial to OSHA, and ultimately to workers, the agency should not allow it to drive its own agenda. With sufficient coordination and cooperation, TSCA referral can solve problems for OSHA, rather than create them. When EPA's initial exposure analyses indicate that the workplace is a primary source of exposure to a potentially hazardous chemical, the recent Memorandum of Understanding will require it to make OSHA aware of that fact at a very early stage to allow OSHA to begin assigning a priority to the topic. And when OSHA finds that it needs more information on a chemical hazard that EPA has the authority to require, the agencies should be able to work out a procedural vehicle for putting the substance on EPA's agenda.[159] Finally, EPA and OSHA should be able to coordinate regulatory activities to allow EPA to use its authority to take more protective actions when OSHA's authority is insufficient. EPA and OSHA have attempted to resolve the information duplication problem with a Memorandum of Understanding. Further interagency coordination could go a long way toward facilitating the use of TSCA in

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[156] Oversight and Investigation of the House Committee on Energy and Commerce, 99th Cong., 1st Sess. (1985); Jacobson Interview, supra note 19.

[157] Id.

[158] See note 148, supra.

[159] Congress clearly intended for the Interagency Testing Committee to play this role to some extent, but the Committee's testing recommendations have tended to stack up at EPA's front door, much as TSCA referrals are beginning to stack up at OSHA's front door. See Delays in Setting Standards, supra note 49. In any event, there is no apparent reason why the two agencies could not work out a bilateral arrangement to facilitate EPA's consideration of OSHA's requests for information, either from EPA's existing files or through the exercise of its authority to require testing.

requiring testing that would be useful to OSHA and in using EPA's TSCA authorities to address risks that OSHA cannot adequately address.

6. Updated Private Standards.

Pursuant to statutory command, OSHA in 1971 promulgated "national concensus standards," incorporating generally accepted health and safety practices as recommended by private and governmental standard-setting organizations.[160] Congress empowered OSHA to promulgate the concensus standards on a one-time basis without notice-and-comment procedures. Unfortunately, in the intervening years the concensus standards have become dated as standard-setting organizations have revised their guidelines and standards.[161] As private standard-setting organizations amend their consensus standards, OSHA could conceivably work the amended private standards into its prioritization process on a case-by-case basis. The primary advantage of a systematic device for updating OSHA standards to reflect changing national consensus standards is the additional protection that it would provide to workers. Since the recommended levels would represent a consensus or near-consensus within the industry, OSHA's efforts should not be as controversial as is typically the case, and the agency might thereby conserve scarce technical and litigation resources.

Adjusting agency priorities to reflect consensus standards does, however, have some significant disadvantages. Some companies would be opposed to the government's singling out a chemical for regulation, even if that regulation was not terribly burdensome, out of concern for the public attention that an OSHA standard-setting action invariably draws.[162] Once it became widely known that OSHA was relying upon the private standard setting agencies in setting OSHA priorities, companies would no doubt focus greater attention on the activities of those entities, a process that might ultimately change the entire nature of the private standard setting process into a less desirable adversarial process. Finally, it is not clear that the order in which private standard setting agencies take up particular workplace risks is necessarily the most appropriate prioritization scheme for the federal government.

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[160] 29 U.S.C. §655(a).

[161] Telephone interview with Arthur Gas, Industrial Hygienist, Directorate of Health Standards Programs, OSHA (October 30, 1986).

[162] Telephone interview with Neil King, Wilmer, Cutler & Pickering (October 28, 1986).

In sum, while OSHA might appropriately look to the activities of private standard setting agencies in setting OSHA priorities, it cannot allow those activities to dominate its agenda. Ultimately, OSHA must establish its own priorities and allow the private organizations to set theirs.

7. NIOSH Criteria Documents.

A plausible argument could be made for the proposition that Congress intended for NIOSH to drive OSHA rulemaking priorities indirectly as it submits criteria documents and recommendations. In theory, NIOSH could have developed a prioritization scheme (presumably in close conjunction with OSHA) and submitted criteria documents in accordance with that scheme. OSHA could have simply taken up the criteria documents seriatim and determined whether or not to initiate rulemaking efforts.[163]

In practice, NIOSH has not been very influential in setting OSHA priorities. Responding to early criticism that it was not submitting enough documents to keep OSHA busy, NIOSH promulgated dozens of criteria documents within the space of a few years, and OSHA now faces a lengthy backlog of aging criteria documents.[164] NIOSH in the early 1970s did study how it should set priorities for preparing criteria documents, but the scheme that it finally hit upon was based heavily upon the quantity of the material produced and did not reflect other judgmental factors very well.[165] Production quantities, in OSHA's opinion, proved to be a poor surrogate for human exposure and toxicity. Hence OSHA was disappointed to receive early criteria documents on such unimportant substances as sulfuric acid, ammonia, sulfur dioxide and sodium hydroxide.[166] In addition, OSHA officials were unimpressed

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[163] Wrenn Interview, supra note 49; Holtzman Interview, supra note 114.

[164] Telephone interview with Larry Mazzuzkelli, Associate Director for Policy Development, Division of Standards Development and Technology Transfer, National Institute for Occupational Safety and Health (November 5, 1986); Gas Interview, supra note 159; Stein interview, supra note 123. The General Accounting Office reported in 1977 that as of September 30, 1976, NIOSH had submitted 53 criteria documents to OSHA. Delays in Setting Standards, supra note 49. GAO Carcinogen Report, supra note 317, at 11. A decade later, OSHA had promulgated final standards

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[165] Wrenn Interview, supra note 49.

[166] Wrenn interview, supra note 49.

with the quality of the criteria documents. It was clearly not the case, as Congress had apparently envisioned, that OSHA had only to tear the covers off the criteria documents and place them in the rulemaking docket to support stringent standards.[167]

In later years, NIOSH has attempted to work more closely with OSHA to set a combined agenda, but these efforts have been largely unsuccessful. NIOSH officials complain that OSHA officials met with them five years ago and demanded fast-track criteria documents for certain substances and then apparently forgot that they had asked NIOSH to do this.[168] When presented with a document that was a high priority for OSHA officials five years ago, current OSHA officials expressed little interest.[169] This experience, not surprisingly, has generated some skepticism in NIOSH about suggestions that the two agencies coordinate their priorities.

In late 1983, OSHA launched a standards completion project under which NIOSH was given a list of 113 chemicals for which OSHA had begun, but not finished, some form of rulemaking activity. By the fall of 1984, NIOSH had updated the existing criteria documents on these substances and recommended that OSHA should: (1)proceed with rulemaking efforts with respect to 49 of the 113; (2) remove temporarily 18 substances from the list pending the completion of ongoing studies; and (3) remove permanently 46 substances from the list because there was not sufficient data upon which to base a regulatory decision. OSHA agreed to "limit its consideration of further regulatory activity to the list," but it did not attempt to prioritize substances on the list.[170]

The strongest argument for giving NIOSH a role in OSHA priority setting is that agency's considerable expertise in evaluating workplace risks. NIOSH has the broad mandate necessary for devoting attention to the somewhat abstract question of priority-setting criteria. On the other hand, OSHA cannot cede its priority-setting power to an agency in an entirely separate Department of the government. Clearly, governmental resources would be best utilized if OSHA and NIOSH

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[164] for less than ten of those 53 topics. During that decade, NIOSH has continued to write criteria documents and in many cases to update old criteria documents.

[167] Wrenn interview, supra note 49.

[168] Mazzuzkelli interview, supra note 164; Stein interview, supra note 123.

[169] Stein Interview, supra note 123.

[170] 1986 Regulatory Agenda 253-54.

combined their resources to address the prioritization problem and adjusted their schedules accordingly.

One problem with this solution, however, is that NIOSH may not be able to maintain the flexibility necessary to deal with the rapid changes in priorities that might legitimately result from outside petitions, congressional and administration pressure, EPA referrals, and ACGIH and ANSI updates. Once NIOSH has initiated the process of preparing a criteria document and recommendations, it cannot easily switch gears and strike off in new directions. Therefore, there will probably always be some mismatch between OSHA and NIOSH priorities. Nevertheless, NIOSH could be very helpful to OSHA in suggesting objective criteria for listing hazardous substances and in assembling the information necessary to compile such a list.

8. Information from the Field.

OSHA has a large cadre of inspectors who are continually observing and monitoring workplaces on a daily basis.[171] Their efforts produce large amounts of information about the levels of some hazardous substances in the workplace.[172] This information can be used to determine how well existing standards are being met and what aspects of the standards are not working or are unrealistic. Field reports of violations of the general duty clause and of deaths and injuries in the workplace can also be examined to ferret out especially hazardous workplaces or work practices.[173] Although other health and safety agencies use reports from the field systemically in setting their priorities,[174] OSHA has only recently begun to develop a system to tap this valuable information for standard-setting purposes.[175]

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[171] By one account, OSHA has 400 industrial hygienists in the field, who have inspected more than 100,000 workplaces. Frodyma Interview, supra note 66.

[172] Field inspections reveal even more information about the validity of existing safety standards and the need for new ones. B. White Interview, supra note 59.

[173] Henshel Interview, supra note 127.

[174] Telephone interview with Arnold Kuzmak, Director, Office of Program Development and Evaluation, Office of Drinking Water, EPA (November 18, 1986); Telephone interview with Judy Segal, Director, Policy and Program Planning Staff,

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[175] Frodyma Interview, supra note 66; Gas Interview, supra note 159.

Field information has not been useful in setting agency priorities in the past.[176] The past information system had several flaws, not the least of which is that it was limited largely to chemicals for which OSHA already had standards. While this information can be useful in evaluating existing standards,[177] it may not be very helpful in setting new standards.[178] In addition, the agency did not pay a great deal of attention to validating the analytical chemistry upon which the measurements for enforcing health standards were based.[179] While inspectors in the field could be expected to identify new safety hazards from observations of hundreds of workplaces and investigations of deaths and serious injuries in the workplace,[180] they not likely to detect many new health hazards.

Reports from the field may be a valuable source of information for priority-setting in the future. At the very least, the agency should have in place a capacity to mine field reports for indications of serious workplace hazards. As the agency's field reporting system achieves greater sophistication, it should prove of increasing value to the priority-setting process.

9. Developments in States and Other Countries.

OSHA has relied very little upon developments in the states and other countries in setting priorities for occupational health standards.[181] However, OSHA does at times face indirect pressure to regulate based upon what the states or other countries have done. For example, automobile workers who live in Detroit and work in Canada are better protected from some risks than workers in U.S. plants.[182]

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[174] Food Safety and Inspection Service, USDA (November 25, 1986); Telephone interview with Barry Felrice, Associate

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[176] Frodyma interview, supra note 66; Sevin interview, supra note 133.

[177] Henshel Interview, supra note 127.

[178] Sevin Interview, supra note 133.

[179] Sevin Interview, supra note 133.

[180] Henshel Interview, supra note 127.

[181] Gas Interview, supra note 159.

[182] Gas Interview, supra note 159.

OSHA standards often guide other countries in setting their own standards. An examination of standards in place in the states and other developed countries may reveal cases in which existing OSHA standards are seriously out of step and may identify risks that are not addressed by OSHA standards at all. While comparative analysis cannot be the engine that drives OSHA's priority-setting process, it may have some role to play.

10. Summary.

An appropriate metaphor for the current OSHA standard setting process is that of a business establishment with a front door, a side window, and a back door.[183] The owner expects most business to come through the front door, but it reserves the back door for dealing with complaints about previous transactions. Especially demanding and impatient customers come in through the side window and thereby avoid the crowd that is pressing at the front door. In the OSHA context, criteria documents, recent petitions, information from the field, and recently amended ACGIH and ANSI recommendations are all pressing at the front door. OMB and the White House are pushing some previously promulgated rules in through the back door, and Congress and the courts are pushing some rulemaking petitions and other "hot" topics through the side window. At present, the press of business for OSHA's reduced staff from the back door and side window is so great that it cannot accept any business through the front door. Instead of an orderly queue at the front door, there is a great crowd of potential topics, each of which is probably deserving of OSHA's attention. At frequent intervals an interest group becomes impatient with waiting in line and moves over to the side window. The time is near at hand when there will also be a disorderly crowd at the side window. OSHA long ago lost control over its front-door agenda; it now risks total paralysis as its limited capacity to produce rules becomes overwhelmed by the press at the side window.

Although some participants and observers of the OSHA rulemaking process maintain that the petition process is alone sufficient drive OSHA toward regulating the most hazardous workplaces,[184] most agree that OSHA should set its own

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[174] Administrator for Rulemaking, National Highway Traffic Safety Administration (November 25, 1986).

[183] Numerous interviewees inside and outside of OSHA confirmed the validity of this metaphor.

[184] E.g., Frodyma interview, supra note 66; Martonik interview, supra note 59; King interview, supra note 162.

priorities.[185] And, despite several failed internal attempts to establish an explicit prioritization scheme,[186] virtually all observers of the process agree that OSHA currently lacks even a rudimentary prioritization process.[187] During the last few years, OSHA's agenda has been set entirely by outsiders.[188] There is no way of knowing whether this externally driven process results in OSHA's addressing the most important rulemaking topics. No one of the outside parties driving the process is concerned with the broad question whether the agency is addressing those topics for which it can be most effective in reducing the most serious workplace risks. While few would argue that past rulemaking petitions have addressed trivial risks, only OSHA is in a position to determine whether a particular rulemaking initiative represents the best use of the agency's severely limited resources.[189] OSHA's inability to set its own priorities also affects the regulated industry's ability to make future investment decisions. Industry representatives complain of the "halting process of regulation" that results from OSHA's failure to establish definite priorities.[190] An explicit and open prioritization procedure would allow OSHA to regain to some extent control over its own agenda, and it would make regulatees and beneficiary groups aware of OSHA's plans for the future.

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[185] Interviews with academics, labor union officials, business officials and OSHA employees revealed virtual unanimity on the proposition that OSHA should have some process for establishing its own priorities.

[186] Harwood interview, supra note 138; Stein interview, supra note 123; telephone interview with Robert Beliles, Senior Scientist, Carcinogen Assessment Group, EPA (October 21, 1986).

[187] Sevin interview, supra note 133; Wrenn interview, supra note 49; Seminario interview, supra note 131; Braslow interview, supra note 123; Sampson interview, supra note 134.

[188] See National Academy of Sciences, National Resource Council, Risk Assessment in the Federal Government: Managing the Process 94 (1983); Interview with Scott Railton, Reed, Smith, Shaw & McCleary, October 30, 1986.

[189] Seminario interview, supra note 131; Sevin interview, supra note 133.

[190] Sampson interview, supra note 134. Railton interview, supra note 188.

An explicit prioritization mechanism would also be useful to OSHA in its internal management. Without a list of priorities, members of the agency staff can never be certain that they will not be called away in the midst of a project to begin a new project with a higher priority.[191] Likewise, OSHA coordination with contractors and other agencies can be arranged so that up-to-date information is available to agency decisionmakers at the time that it will be most useful.[192]

There are, however, significant practical disadvantages to adopting a formal prioritization scheme. First, the agency must come up with a rational scheme for ranking priorities. Fortunately, there is near unanimity that the ideal prioritization scheme would stress risks to workers (including considerations of toxicity and extent of exposure), with perhaps some attention being paid to the practicality of controls. Unfortunately, there is rarely enough high quality information available to make quantitative comparisons. Still, as the next section of this Report reveals, there are alternatives to the "chemical of the week syndrome," and OSHA should be able to create a procedure for prioritizing chemicals, even if it is not perfect.

Another disadvantage of a prioritization scheme is that it necessarily forces upper level decisionmakers in the agency to make hard decisions about which subjects warrant attention. In addition to making difficult substantive rankings, such as the relative weight to be given to substances that pose small risks to a large number of workers versus substances that pose a very high risk to only a very few workers, the agency must make difficult political choices about which employees should be protected and which industries should be subject to new agency standards. There is an understandable desire on the part of OSHA to pressure the "mystique" that everything that comes before it has a high priority.[193] Any attempt to state explicit priorities will destroy this mystique.

Similarly, explicit prioritization can make it difficult for the agency to explain why it is not proceeding ahead rapidly with a politically controversial project. For example, under the current OSHA regime, which lacks a prioritization scheme, the agency can put its efforts to promulgate a safety standard for the oil and gas industry on the "back burner" while that industry suffers through an economic recession,[194] and it can elevate to a high priority uncontroversial projects that will not necessarily produce large health or safety benefits but which will yield attractive statistics.[195] With an explicit prioritization scheme in place, OSHA would at least have to explain why one standard has slipped in priority, and why another project has moved ahead, a task that might prove unpalatable to agency leaders.

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[191] Sevin interview, supra note 133; Stein interview, supra note 123; Braslow interview, supra note 123.

[192] Stein interview, supra note 123.

[193] F. White interview, supra note 59; Frodyma and Flowers Interview, supra note 66.

Finally, to the extent that the prioritization scheme results in a public list or agenda, the agency can expect resistance from those with an economic interest in the hazards that wind up on the list. The agency will never be able to justify rationally why it placed one topic above the next lower one, because large uncertainties surround priority setting in the context of OSHA rulemaking. If interested parties may force the agency to justify any particular ranking to a reviewing court, it will probably fail. The agency will only be able to adopt an explicit prioritization scheme if the reviewing courts are educated about the difficulties of setting priorities and if they understand that priority-setting is a tentative threshold exercise that does not necessarily imply that any regulatory action will be taken in the long run. As will be discussed later in this section, the appropriate place for judicial review is after the agency takes action with respect to a workplace hazard, not after it has decided which hazards to examine.

Despite these disadvantages, there is at this point in OSHA's evolution a broad consensus around the view that OSHA must assume control over its own rulemaking agenda. The Administrative Conference has already recommended in the context of regulating carcinogens that agencies set priorities for selecting chemicals for further testing, for intensive scientific and regulatory evaluation, and for administrative action to limit or eliminate exposure.[196] The advantages of preparing an explicit list for this purpose substantially outweigh the disadvantages.

> RECOMMENDATION: OSHA should immediately establish a process for determining an explicit list of agency priorities to which OSHA will presumptively adhere in undertaking future rulemaking intiatives.

B. Alternative Prioritization Schemes.

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[194] Frodyma Interview, supra note 66.

[195] Interview with Daniel Jacoby, Department of Labor, Office of the Solicitor, in Washington, D.C. (September 26, 1986).

[196] ACUS Recommendation No. 82-5, 1 C.F.R. §305.82-5 (1986).

Although the question of prioritization is never an easy one for an agency charged with writing high-stakes regulations in an area dominated by poor information and huge uncertainties, other agencies appear to have achieved a much greater degree of success than OSHA. The Environmental Protection Agency, for example, administers several programs that require the agency to set priorities for health and environmental regulations, and that agency still maintains a fair degree of control over its own destiny, insofar as its highly detailed statutes give it control to begin with. There are several broad models from which OSHA may choose in selecting an approach to prioritization, including ad hoc management choices, systematic selection by committee, numerical scoring systems, and quantitative risk assessment.[197] This section of the report will examine the advantages and disadvantages of each of the available models and suggest a process that will allow OSHA to integrate one or more models into its own agenda-setting efforts.

1. Ad Hoc Management Choices.

The current prioritization scheme at OSHA, to the extent that one can be identified at all, falls into the first category of "ad hoc management choices." Under this regime, management reacts to all potential sources of agency priorities in an unbounded fashion. Each person requesting agency action is told that the agency will get to his topic as soon as possible. Management then assigns the topic to a staff member who is already busy with many other items. The staff member receives subtle signals through his superiors from upper level management about the amount of attention that he should devote to the assigned topic, and these signals may change periodically as the topic heats up and cools off in the highly political atmosphere in which upper level management operates. Upper level management may gather with staffers and mid-level management periodically to "brainstorm" about agency priorities, especially at the time of the year when the agency must prepare its submission for the President's Regulatory Agenda.[198] But these meetings do not result in firm institutional commitments. The agency "intuitively" knows that some topics are more important than others, but it never makes the criteria by which it knows this explicit.[199]

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[197] The following analysis derives much from the observations of Dr. Imogene Sevin, an OSHA health scientist, who has devoted a great deal of attention to the question of priorities as an employee of both NIOSH and OSHA.

[198] The first prioritization process in NIOSH relied heavily upon brainstorming by agency staff. Sevin Interview, supra note 133.

The ad hoc management approach has at least four advantages that render it especially attractive to upper level managers. First, it is fast and inexpensive. It does not require much informational input, because it relies very heavily on the informal judgment of agency management and staff.[200] Since it is very hard, for example, to compare a large risk of contracting hepatitis with a small risk of contracting cancer except on an "intuitive" basis,[201] an agency using the ad hoc approach can avoid expensive data gathering and analysis that would probably not make the decision any easier.

Second, its flexibility enhances the discretion of upper level management. Management is not bound by ironclad agendas that reflect technical input but do not consider political realities. Management decisions are not implicitly driven by the hidden agendas of lower level staff. Management may put items on the "back burner" when there is no apparent pressure to force them through the process and, by contrast, management can accelerate "side-window" items rather rapidly through the process when outside pressures grow.

Third, the ad hoc management approach allows politically accountable upper level management to avoid making definitive decisions that are certain to annoy one or more constituencies. It reinforces the natural desire of politically accountable decisionmakers to have good news for everyone. The agency is never in the position of telling a constituency group that its vital topic is not very important to the agency.

Finally, the ad hoc approach minimizes the amount of explaining that the agency has to do. It does not have to come up with seemingly rational arguments for the essentially arational task of placing one topic higher on its agenda than another. Only when a petitioner is sufficiently put off by the agency's lack of resolve that it is willing to file a bureaucracy-forcing action in court is the agency called upon to explain itself, and even then it can often satisfy the reviewing court by producing an optimistic schedule and assuring the court that the agency has adjusted its priorities so as to make a good faith effort to meet the now-explicit deadlines.

The primary advantages of the ad hoc management approach are also its chief disadvantages. Because it requires less information and relies so heavily upon political judgment, it is likely to do a poor job of ranking hazards according to true relative risks.[202] Because of its extreme sensitivity to political pressures, the ad hoc approach will not necessarily address the worst occupational hazards first. For example, there is fairly broad agreement within the agency that an oil and gas industry safety standard would provide very large safety benefits, but political considerations have essentially eliminated that topic from the agency's agenda. Conversely, the political furor that erupted over the discovery of ethylene dibromide in citrus and food grains sent OSHA scurrying to promulgate an EDB standard that will protect only a relatively few workers from a substance that is almost certainly doomed to extinction in the near future.[203]

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[199] Frodyma interview, supra note 66. See also Delays in Setting Standards, supra note 49, at 19-21 (relating ad hoc prioritization in NIOSH and OSHA in the mid-1970s).

[200] Sevin interview, supra note 133.

[201] Frodyma interview, supra note 66.

There is still some vitality left to the theory that Congress created regulatory agencies to bring expertise to bear on social problems. When technical considerations are capable of identifying topics that should be high on OSHA's agenda, it should use its expertise to find them, rather than blowing with the political winds. Although technical considerations could be more relevant to ad hoc management decisions than political considerations, OSHA's technical staff is in practice seldom consulted when management makes the inexplicit decisions that subtly drive agency priorities.

A second disadvantage of the ad hoc management approach is that outsiders generally do not know the real status of topics of interest to them. They are simply told that the agency is working on it, without any indication of how high the matter is on the agency's agenda. Indeed, even agency staff are often at a loss as to the status of the topics assigned to them when they receive only inexplicit signals from upper level management filtered through mid-level management. Low level staffers sometimes express a sense of frustration at working very hard on a topic only to discover that it is a low priority item when it languishes on the desk of an upper level decisionmaker.

Third, when combined with a high turnover rate at upper management levels, the ad hoc management approach can breed inconsistency. Under the current ad hoc prioritization approach, priorities changes as one leader replaces another.[204] Even if one Assistant Secretary is succeeded by a like-minded person, he or she must still be educated about why certain items had low priority and others high priority.[205]

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[202] This was, for example, one of the real failures of the original NIOSH hazard ranking approach, which relied heavily upon staff brainstorming sessions. Sevin interview, supra note 133; Wrenn interview, supra note 49.

[203] Vladeck Interview, supra note 17. Another frequently cited example of a politically inspired rulemaking initiative that had the potential to achieve relatively few health and safety benefits is the never-completed "walkaround pay" initiative. See B. Mintz, supra note 69, at 546-56; Bokat Interview, supra note 60.

Fourth, the vacillation that typifies the ad hoc management approach can also be wasteful of agency resources. A lot of the work that goes into a project is wasted when that project is mothballed until the next time that it becomes controversial. When it finds its way back onto the agency's agenda, much of the previous work must be repeated. For example, much of the work that the agency had done on cadmium in the late 1970s, before it was implicitly shelved in the early 1980s must be repeated now that a petition has once again forced it to near the top of the agency's agenda. In short, the ad hoc management approach lacks a vehicle for making final decisions to drop topics from the agency's agenda. Issues tend to wallow around the agency for years without any direction. The ad hoc management approach lacks a mechanism for putting old semi-abandoned projects out of their misery.

2. Quantitative listing.

At the opposite extreme from ad hoc management choices is the quantitative listing approach to setting agency priorities. Under this approach quantitative analysis of technical considerations determines a ranked list of agency priorities. All of the existing quantitative approaches are founded on the rather uncontroversial assumption that the agency should give its highest priority to those workplace conditions that pose the greatest risks to employees. The prioritization process is then determined by a technical evaluation of the relative risks of the relevant universe of rulemaking subjects, with some allowance made for administrative and (perhaps) technological and economic feasibility.

a. Risk Assessment.

The most technically precise quantitative listing approach relies on strict quantitative risk assessment. Based upon information on the toxicity of various compounds and the extent of worker exposure, the agency technical staff undertakes quantitative risk assessments and ranks substances according to their relative risk to workers.[206] For example, EPA has developed some fairly sophisticated risk assessment tools that rely upon a combination of data bases on health effects and exposure routes.[207] By focusing on actual exposure, rather than allowable exposure, the risk assessment approach keeps the agency from initiating rulemaking efforts on substances for which actual exposures are far lower than current public or private standards.[208] If the risk assessments could be performed accurately, the agency could rest assured that it was addressing the worst risks first.[209]

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[204] Sevin interview, supra note 133.

[205] Sevin interview, supra note 133.

Risk assessments are available for many chemicals. NIOSH criteria documents often contain risk assessments or contain sufficient information on toxicity and exposure to allow OSHA to produce a rudimentary risk assessment with minimal resource expenditure. EPA has also performed risk assessments on a large number of chemicals in connection with its many regulatory programs. After modifying such risk assessments to reflect workplace exposure, OSHA could use them to establish agency priorities. In addition, EPA's Office of Toxic Substances has written numerous chemical hazard identification profiles (CHIPs) summarizing available information on chemicals that could be helpful in drafting rudimentary risk assessments. Finally, the published literature contains an increasing amount of risk assessment work, although this is generally limited to well-known hazards for which other risk assessments are often available.

One disadvantage of risk assessment-based listing is the unsettled state of the risk assessment art. Risk assessment tools are only available for a very few health effects, such as carcinogenesis.[210] Good quantitative tools for other subtle

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[206] See Peat, Marwick, Mitchell & Co., The Role of Risk Assessment in Setting Federal Regulatory Priorities, Report Prepared for the Chemical Manufacturers' Ass'n. I.V.C. (1984) [hereinafter cited as Peat, Marwick Report].

[207] Environmental Protection Agency, TSCA Priorities and Progress (1983).

[208] Harwood interview, supra note 138.

[209] See generally, D. Pedersen, R. Young, D. Sundin, A Model for the Identification of High Risk Occupational Groups Using RTECS and NOHS Data (NIOSH Technical Report 1983) (Describing computer program for combining risk data from

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[210] Sevin Interview, supra note 133; Mazzuzkelli interview, supra note 164; Stein interview, supra note 123; Beliles interview, supra note 186.

health effects, such as neurological effects and reproductive effects, do not exist exist. Even those quantitative tools that are available are always controversial.[211] For example, the outputs of quantitative risk assessment models for carcinogenesis can vary over ten orders of magnitude.[212] With this degree of sophistication, such models cannot be expected to yield accurate predictions of real-world risks. On the other hand, precise predictions are not necessary for the prioritization function. The list need only reflect the risks that various chemicals pose relative to one another. The predictions need not be accurate in absolute terms. As long as the same model is used to evaluate all of the chemicals, the ranking should be appropriate, absent some fundamental flaw in the model.

Another severe drawback to risk assessment-based listing is the poor state of the information that is typically available to the agency at the prioritization stage. Unless the agency is prepared to do a substantial part of the standard setting job while it is setting priorities, it cannot produce an accurate risk assessment-based prioritization list. Since OSHA lacks authority to force manufacturers to test chemicals, it may not even have rudimentary toxicological data on chemicals for which there are high workplace exposures. Conversely, the agency at this early stage often lacks accurate information on worker exposure to highly toxic chemicals. The agency must take advantage of whatever information it can conveniently locate. Unfortunately, this information is often of disturbingly low quality.[213] The agency then faces the dilemma of comparing risks assessed on the basis of high quality studies with risks assessed on the basis of poor or invalid studies. The risk assessment-based listing approach does not provide a convenient way to adjust priorities based on the quality of the available data. Since the assessments that

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[209] the Registry of Toxic Effects of Chemical Substances with exposure information from the National Occupational Hazard Survey).

[211] Mazzuzkelli interview, supra note 164; Stein interview, supra note 123.

[212] Comment, The Significant Risk Requirement in OSHA Regulation of Carcinogens: Industrial Union Department, AFL-CIO v. American Petroleum Institute, 33 Stan. L. Rev. 551, 564 n. 68 (1981).

[213] Seminario interview, supra note 131. For example, the priority list that OSHA promulgated as part of its carcinogen policy was based upon some studies of very dubious quality. Sevin interview, supra note 133.

the model produces are of dubious validity, the prioritization list that it yields is of doubtful utility.

A third disadvantage of the risk-assessment based listing approach is the fact that it implicitly requires a comparison of different health effects end-points. Should a chemical that causes three cancers per year be given a higher priority than a chemical that causes three thousand cases of contact dermititis? Should a standard addressing reproductive effects be giving higher priority than a standard addressing foot injuries? Quantitative risk assessment, as such, does not answer these difficult questions.[214] At the very least, then, the risk assessment-based listing approach can only yield several different lists based on different end points or a single list that reflects an implicitly determined weighting factors for various end points.

Finally, the risk assessment-based listing approach does not incorporate administrative, economic and technological feasibility considerations. For example, OSHA might possibly reduce a large number of relatively minor risks by an easily complied with rule that it could enact without much controversy and at minimal administrative expense. In the overall scheme of things, that rule might be more effective than a high-stakes effort aimed at a very important chemical that will require a burdensome public hearing, controversy with OMB, and judicial review that might result in no standard at all.

b. Megascoring Devices.

Megascoring prioritization devices attach quantitative scores to identifiable aspects of potentially hazardous workplace conditions and then total the scores to achieve a "megascore" by which the hazards are ranked.[215] The

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[214] Sevin interview, supra note 133.

[215] Sevin interview, supra note 133. See United States Environmental Protection Agency, Hazardous Air Pollution Prioritization System (1982) (megascoring system for ranking hazardous air pollutants); 45 Fed. Reg. 75488 (1980) (relatively unsophisticated megascoring system for ranking pesticides relying entirely on production volumes and projected exposures to humans and fish); 47 Fed. Reg. 31219 (1982) (Hazard Ranking System for cleanup of hazardous waste sites); 42 Fed. Reg. 55026 (sophisticated megascoring system for determining testing priorities for chemicals); Final Report of the OSW Regulatory Priorities Workshop (1985) (subjective scoring of regulatory activities required by recent amendments to Resource Conservation and Recovery Act); Schwartz, supra note 135, at 48 (Consumer Product Safety Commission's Consumer Product Hazard Index).

Interagency Testing Committee, which is charged by statute with recommending chemicals to EPA for further health and environmental testing, relies heavily on such a scoring device to rank chemicals.[216] Megascoring devices can use information that is more easily available than the information that is necessary for quantitative risk assessment. For example, production quantities might be used as a rough surrogate for actual worker exposure. Because they are less resource-intensive than risk assessment-based listing approaches, megascoring devices can be applied to a larger universe of workplace hazards.

The scores that are attached to various aspects of workplaces are expressed quantitatively, but they may be qualitative in origin. For example, scores can be adjusted to reflect the degree of confidence that the agency has in the quality of the available evidence. Similarly, subjective considerations like the relative weight to be given to different health effects end points can be incorporated by assigning different scores to different end points. Finally, megascoring devices can incorporate administrative, economic and technological feasibility considerations into the ranking scheme by attaching scores to those aspects of rulemaking topics.

The greatest disadvantage of megascoring devices is their inaccuracy. Since they are based upon surrogates for real data and since they rely heavily upon subjective considerations, the user of a megascoring device cannot be confident that the device has listed workplace hazards in the order of decreasing hazard. For example, it is difficult for megascoring devices to take into account the extent to which workers are protected by existing standards. Scores based solely upon toxicity might indicate a large hazard, even though current standards or practices reduce that hazard considerably.[217] Much of the information needed for even a rudimentary scoring exercise is in the hands of EPA and NIOSH and is not easily accessible to OSHA; nor does OSHA have the control over the details of producing the data necessary for putting it in an easily usable form.[218]

Like the risk assessment approach, megascoring does not leave room for overt political considerations. Although subjective factors play a role, they are all relevant to the primary task of locating the worst actors in a technical sense. The megascoring device does not address the political needs of the agency leadership. The device could rather easily be adjusted to incorporate political concerns, such as the intensity of congressional, OMB and beneficiary group interest, by assigning additional scores to those factors, but the very statement of this possibility suggests its impracticality. The fact that the agency explicitly factored the reactions of congressional subcommittees and the White House into a prioritization model would at some point become a matter of public record, inviting inquiries into how the agency derived the quantitative measures of displeasure.

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[216] Sevin interview, supra note 133. See also Peat, Marwick Report, supra note 206.

[217] Wright interview, supra note 142.

[218] Sevin interview, supra note 133.

3. Prioritization by Committee.

Much government work is done by committees specially charged with accomplishing certain tasks. Following this pattern, OSHA could establish a committee to set its priorities, subject to review by the Assistant Secretary. There are several variations of the committee approach, ranging from a committee of upper level management making ad hoc decisions (which would be virtually indistinguishable from the ad hoc management approach) to a committee of outside experts assigned to draw up a priority list for the agency (which would in many ways be indistinguishable from the numerical scoring and risk assessment approaches). The discussion that follows will assume that the committee is composed of persons with technical competence and persons who are sensitive to political considerations. The committee would meet regularly to establish agency priorities on the basis of past priorities and new considerations that arise in the interim between meetings. Agency staff would provide the committee with profiles of various chemicals summarizing the existing information on chemical risks and if available ease of avoiding those risks.

The committee approach has been adopted in numerous regulatory settings that are very similar to OSHA standard-setting. For example, Congress established an Interagency Testing Committee to prioritize and chemicals for required testing under the Toxic Substances Control Act.[219] The Office of Toxic Substances uses the committee approach in prioritizing candidate chemicals in the premanufacture notification process under the Toxic Substances Control Act.[220] NIOSH is currently adopting a committee approach toward setting its own priorities.[221]

The committee approach preserves much of the flexibility of the ad hoc management approach while at the same time incorporating technical expertise into the priority setting process. The committee could change priorities, based on new information, new assessments of old information, judicially imposed deadlines, and changed political circumstances. At the same time the agency's priorities would be stated explicitly at the end of each meeting, so that beneficiaries and regulatees would be aware on a continuing basis of the status of relevant topics.

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[219] TSCA 4.

[220] Peat, Marwick Report, supra note 206, at IV.11.

[221] Sevin Interview, supra note 133; The NIOSH Priority Topic System (Briefing Paper prepared by NIOSH for OSHA's Health Standards Directorate.)

The committee approach gives upper level management the chance to relay some good news to petitioners -- viz. that the petition has been referred to the prioritization committee which will determine where the matter ranks among the agency's overall priorities. The agency would also have a response to judicial actions. It could say that a committee has been appointed to set priorities, the committee has considered the petition, and the committee has for the time being ranked it as a low priority. In other words, the committee approach would allow activities in through the side window, but it would concentrate primarily on the front door items. Finally, the continuity that could be expected from the committee approach would also reduce the risk of wasting agency resources on reinvigorating previously moribund projects. The Committee could be charged with terminating old projects as well as with initiating new ones.

Technical input could be ensured by appointing knowledgeable technical people to the committee and by requiring the committee to focus closely on chemical hazard profiles. The committee could likewise use the results of available risk assessments and multiscoring exercises in its deliberations. For example the Office of Solid Waste in EPA has adopted a committee approach to prioritizing the regulatory activities over which the agency has some control. Agency analysts recently had the members of the committee engage in a megascoring exercise in which members of the committee were asked to assign relative weights ranging from one-to-five for various aspects of hazardous waste regulation, including the hazard of the particular waste, number of operators, probability of human exposure, ease of implementation, administrative resource requirements, overall societal resource requirements, and interprogram effects. The committee's responses were averaged to provide a team weighted average, which was then applied to quantitative information that the staff possessed about 37 potential rulemaking activities to come up with a ranked list of the 37 activities.[222/]

The committee approach does have some disadvantages. By turning priority setting over to a committee, upper level management loses some control over the agency's agenda. Less

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[222/] Telephone Interview with Dale Ruhter, Branch Chief, Economic Analysis Branch, Waste Management and Economics Division, Office of Solid Waste, EPA (November 20, 1986).

politically accountable members of the committee will make decisions that in practical effect bind the agency, even though upper level management has the final say. The agency has in the past experienced some difficulties with "renegade teams" that seek to implement policy preferences of lower level staff that differ from those of the politically accountable senior staff. Sometimes members of renegade teams feel so strongly about policy issues that they take their case to the press, rather than keeping the policy debate within the confines of the agency. This potential is reduced, however, if the committee contains agency employees who are likely to be responsive to upper level management's wishes or if upper level management is included in the committee. Finally, the Assistant Secretary would, of course, have the power to amend the committee's priority list, but that amendment would be a matter of public record.

Other disadvantages of the committee approach are the problems that afflict any group decisionmaking device. For example, committees can become afflicted with the vision-narrowing disease referred to in the public policy literature as "groupthink." The committee must have a chairman who is willing to bring matters to closure. Since the committee would be more in the nature of a decisionmaking entity than a study committee, it would have to decide how it would address the absence of consensus and whether dissenting opinions would be allowed or encouraged.[223]

C. Recommendations.

We strongly recommend that OSHA establish a procedure for priority-setting for its rulemaking activities. Since OSHA does not currently have a priority-setting mechanism in place, this will require additional resources or a reprogramming of existing resources. The agency's resources (particularly in the Health Standards Directorate) are so thinly stretched that it would be better to secure additional resources for a priority-setting entity,[224] which might be lodged in the Policy Directorate. In the past, OSHA has on occasion assigned to a single staff employee the job of coming up with a prioritization scheme, but this has always been one of many jobs for which that staff person had responsibility.[225]

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[223] Consensus would no doubt be impossible on the controversial and policy-dominated questions that the committee would have to decide. There probably should not be a requirement that the committee reach consensus. Seminario Interview, supra note 131.

[224] Harwood Interview, supra note 138; B. White Interview, supra note 59; Telephone interview with Jennifer Silk, Directorate of Health Standards Programs, OSHA (October 24, 1986); Stein Interview, supra note 123.

> RECOMMENDATION: OSHA should make priority-setting a high priority. The agency should consider devoting at least one full-time staff person to the task, and the priority setting unit should be given sufficient resources to gather information on candidates for priority lists and to perform risk assessments and megascoring exercises.

The Committee approach seems the most promising of the three approaches discussed above. It has many of the advantages of the other two approaches and fewer of the disadvantages. Therefore,

> RECOMMENDATION: OSHA should establish a permanent prioritization committee charged with drafting an initial ranked list of agency priorities from the 47 topics that resulted from the standards improvement project and the pending rulemaking petitions. The committee should be further charged with meeting on a continuing and periodic basis to re-examine the existing list, add items to it, and remove items from it. To preserve badly needed continuity, committee membership should not turn over any more rapidly than once every three years, and committee members should be eligible for reappointment.

The membership of the committee should reflect both technical expertise and political sensitivity. One way to ensure this would be to make the Committee a formal advisory committee composed of nonemployees consisting of technical experts and representatives of a broad range of constituency groups. Such a committee could not, however, be an actual decisionmaking entity; it could only make recommendations to agency management. Alternatively, the committee could be composed of agency employees from various offices in the agency and chaired by a very high level agency employee, such as one of the Deputy Assistant Secretaries.

One variety of the committee approach that has often been attractive to agencies engaged in scientific rulemaking is the outside committee of experts appointed by the National Research Council of the National Academy of Sciences (NAS).[226] NAS committees have helped set priorities for drug regulation, pesticide regulation, drinking water standards, and numerous other governmental activities. The primary advantages of this approach are that it brings very high quality expertise to bear on the problem and that it can diffuse political heat. When the agency's prioritization decisions are challenged, it can simply point to the committee of experts and suggest that no single challenger (who usually has some kind of economic interest in the outcome) is qualified to second guess the highly expert and objective committee.

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[225] Harwood Interview, supra note 138.

[226] See generally Grobstein, The Role of the National Academy of Sciences in Public Policy and Regulatory Decision Making, in Law and Science in Collaboration 115 (Nyhart & Carrow eds. 1983).

The chief drawback of the NAS committee is the fact that these policy-laden decisions cannot be made on a purely scientific or technical basis. There is no good reason for the agency to cede control over (and responsibility for) its priorities to a panel of outside experts. The experts may have their own policy agendas, which may differ from those of the agency. Other disadvantages are the expense of assembling and maintaining a semi-permanent committee and the time that would inevitably pass before the committee, which would be composed of persons working on a very intermittent basis, could report back to the agency. A scientific committee would want to deliberate very carefully before writing a list that might have grave economic consequences. Many members of the committee would have to be educated on the specifics of the information on particular workplace hazards. As a realistic matter, it would probably take at least 3-4 years for an NAS committee to come up with an initial list. OSHA may not have the time or resources to support that endeavor.

> RECOMMENDATION: OSHA should establish a prioritization committee made up of OSHA employees with nonvoting representatives from NIOSH and EPA. The committee should be composed of high level management staffers at at least the Deputy Director level and highly regarded health professionals from the agency's technical staff. The meetings, which would discuss policy as well as technical considerations, should be closed to the public, but the results of the meetings should be made public, after the Assistant Secretary has had an opportunity to consider and overrule any decision made by the committee.

If the committee is established in accordance with the above recommendation, its first task of drafting an initial ranked list will be quite burdensome and no doubt controversial. One possible device to aid the committee in this initial task would be to hold one or more "consensus workshops" that all committee members would attend and during which all of the relevant interest groups would attempt to agree on a consensus list of priorities.[227] For example, NIOSH recently held a national strategy workshop to help that agency set its top ten priorities.[228] Similarly, the Keystone Center has been successful in conducting consensus workshops on technical issues relevant to questions of public policy concerning natural resources. The consensus may fall apart as the group proceeds down the list, but there may well be a fair degree of consensus about what topics should be at or near the top of the list.

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[227] Seminario Interview, supra note 131.

> RECOMMENDATION: Prior to establishing on initial priority list, OSHA should hold one or more consensus workshops at which relevant interest groups would be asked to agree upon a consensus list of priorities.

The Committee should use existing risk assessments in establishing its initial prioritization list and in undertaking subsequent modifications, but it should be aware of the drawbacks of risk assessments, and it should not allow risk assessments alone to determine priorities. Existing megascoring schemes are so laden with pitfalls that the Committee should devote little attention to them. If the Committee is to perform its ambitious task expeditiously, it must resist the temptation to develop its own megascoring device and proceed ahead with whatever information is conveniently available on the application of existing megascoring devices to relevant chemicals. The Committee should likewise resist the temptation to incorporate by reference lists of toxic chemicals that have been developed for other purposes. While such lists may be helpful in defining the universe of hazards upon which the agency will draw in promulgating its own priorities list, the entity should do its own work.

> RECOMMENDATION: The entity that establishes agency priorities should use existing risk assessments, as well as other technical and policy considerations, in carrying out its task. It should not commission full-blown risk assessments in setting the initial priorities list, but it may decide to develop more sophisticated risk assessments in modifying the list. The entity should not develop its own megascoring device for setting priorities, and it should not incorporate by reference lists prepared by other agencies for other purposes.

OSHA can expect resistance to any explicit priority list from the regulated industry for reasons other than a company's natural reluctance to be the subject of an OSHA standard. No company is happy to see a chemical that it deals with labeled a "bad actor," even if regulatory consequences never flow from that determination.[229] For example, an OSHA priority list might trigger products liability lawsuits.[230] In addition, industry lawyers sometimes refer to the "tyranny of lists," pointing out that one agency's list prepared for a limited purpose may get adopted by another agency for an entirely different purpose.[231] OSHA might also anticipate opposition from beneficiary groups that believe that hazards relevant to their interests are too far down the priority list.

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[228] Seminario Interview, supra note 131.

The agency can reduce the opposition of outside groups to an explicit list somewhat by grading chemicals and other hazards, rather than ranking them in numerical order. For example, rather than ranking 50 potentially hazardous chemicals on a scale of 1 to 50, the committee could divide the 50 into 10 "top priority" chemicals, 10 additional "very high priority" chemicals, 10 additional "high priority" chemicals, 10 additional "middle priority" chemicals, and 10 additional "low priority" chemicals. New chemicals that come to the agency's attention through new studies or petitions could be assigned one of the five priority rankings, and the rankings of chemicals on the list could change as new information became available to the agency and as it completed rulemaking with respect to its top priority chemicals.

The agency should take the firm position that the Committee's priority ranking lists are merely internal aids to setting the agency's rulemaking agenda and are not themselves rules subject to notice and comment procedures. The agency should strongly avoid creating the impression that the list is in any way a "declaration of hazard;"[232] rather, OSHA should stress the tentative nature of the list, pointing out that placing a chemical or workplace on the list in no way obligates the agency to take regulatory action.

Because outside parties may have information that could be important to the agency's ranking decision, the committee should invite public comment on the committee's work, and the committee should be open to changing the ranking in light of the comments. But the agency should take the position that informal rulemaking procedures are not required, and it should strongly resist judicial review of the prioritization list.[233] If the evolving list is subject to judicial review upon initial promulgation or upon amendment, then the attendant delays may defeat the purpose of the entire exercise.

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[229] Kronenbush Interview, supra note 122.

[230] King Interview, supra note 162.

[231] For example, Section 101 of CERCLA defines as a "hazardous substance" any substance that is listed on one of several lists of substances prepared pursuant to several other statutes.

[232] Sampson Interview, supra note 134.

There is a sound legal basis for this position. A challenge to the list would probably not be ripe for review until the list is applied in an individual case to initiate a rulemaking action, in which case judicial review would only be appropriate at the end of the rulemaking activity. In applying the judicial doctrine of ripeness, the courts evaluate the fitness of the relevant issue for judicial decision at the time that it is raised and the hardship to the parties of witholding judicial consideration.[234] The relative position of a particular hazardous substance on the list proposed here is not generally appropriate for judicial consideration. The list would be based on a combination of technical and policy considerations for which there is little statutory guidance other than a general statutory preference for addressing the most hazardous workplaces first.[235] Like the decision not to prosecute a law violator,[236] the decision where to rank a substance on a priorities list is highly discretionary and not generally amenable to judicial second-guessing. In addition, since the list would be subject to change by the proposed committee in light of new information and changed policy considerations, there is no particularly appropriate time for evaluating the "correctness" of the list. Rather than seeking judicial review of the list, a party with an interest in the list should petition the agency to change it. Finally, it is difficult to see how a party with an interest in a substance on the list can suffer much hardship from the mere presence of that substance on the list, especially if the agency is careful to maintain the position that the presence of a substance on the list in no way commits the agency to take any regulatory action.[237] On the other hand, review of the

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[233] The Administrative Conference has recommended that agencies consider rulemaking procedures for priority-setting systems, but "more informal methods are appropriate for ranking individual chemicals for

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[234] Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136, 148-49 (1967). See 4 K. Davis, Administrative Law Treatise § 25:6 (1983).

[235] 29 U.S.C. § 655(g).

[236] See Heckler v. Chaney, 105 S.Ct. 1649 (1985).

[237] See State of Texas v. United States Dept. of Energy, 764 F.2d 279 (5th Cir. 1985) (designation of two sites as

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list itself would pose a great hardship to OSHA and affected workers, because the workers would be exposed to hazards for the full period of judicial review of the list before OSHA could begin to undertake protective action.[238]

> RECOMMENDATION: The entity that establishes agency priorities should publish and allow public comment upon a proposed list of 50-75 rulemaking topics. The list should either rank the topics individually or assign them to classes. OSHA should take the position that the list is not a final rule for which judicial review would be appropriate.

Assuming that a court did decide to review the list in isolation, it is highly unlikely that it would overturn a reasonable scheme, even if OSHA could not support it with hard

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[233] evaluation and regulation. ACUS Recommendation No. 82-5, 1 C.F.R. §305.82-5.

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[237] potentially acceptable sites for a nuclear waste repository not ripe for judicial review).

[238] See J.V. Peters & Co. v. EPA, 767 F.2d 263 (6th Cir. 1985) (EPA action to clean up hazardous waste dump not ripe for review at request of party who might later be sued for respose costs; court stresses harm that lengthy judicial review would pose to the environment). The recent D.C. Circuit opinion in Eagle-Pitcher Industries, Inc. v. EPA, 759 F.2d 906 (D.C. Cir. 1985) is not to the contrary. In that case the petitioners did not file a challenge to the EPA's Hazard Ranking System for hazardous waste dumps until after the 90-day statutory period for seeking judicial review had run. Petitioners claimed that the challenge to the system was not ripe when EPA promulgated regulations implementing the system and that it did not become ripe until EPA used the system to promulgate a National Priorities List. The court rejected this argument, but at the same time implicitly held that arguments concerning the list were ripe at the time that the suit was finally filed. The agency's statute specifically required that the agency promulgate the list by regulation, the statute specified rather specific criteria for creating the list, and the statute provided for judicial review of regulations. The priorities list proposed here is not required by statute, and it would not be a regulation. Rather, it would be an internal aid to guide the agency staff in allocating resources.

data and analysis. Perhaps the closest case in point is Eagle-Pitcher Industries, Inc. v. EPA,[239] in which the D.C. Circuit upheld EPA's hazard ranking system and national priorities list for prioritizing waste sites for action under the Comprehensive Environmental Response, Compensation and Liability Act. Pursuant to statute, EPA prepared a list of 400 sites that were contaminated by hazardous substances. To accomplish this job, EPA, after notice-and-comment, promulgated a Hazard Ranking System (HRS), which was designed to estimate the potential risks of hazardous substances releases. The HRS was a megascoring device that relied fairly heavily upon risk assessment. Analyzing three pathways for release of hazardous substances, the HRS took account of three factors (likelihood of release, toxic characteristics of the substances, and the population or sensitive environments that were threatened) that in turn incorporated other factors. EPA acknowledged that the HRS contained many imperfections and that the resulting National Priorities List incorporated those infirmities. Nevertheless, the court rejected attacks on the system and held that it was not arbitrary and capricious.

The court first rejected the contention that the list had to contain the 400 most hazardous sites. The court agreed with the agency that the statute permitted it "to establish a lower minimum level of certainty that a release or potential release poses a threat for purposes of listing on the NPL than for actually taking government action."[240] The court further agreed with the agency that the standards for placing a site on the list and the standards for ordering cleanup of a site were not identical. The court recognized that in deciding whether to list a site, EPA would have to rely upon the little information that was available at the time: "Clearly, the EPA's decision to reconcile the need for certainty before action with the need for inexpensive, expeditious procedures to identify potentially hazardous sites by establishing different threshold criteria for action and for listing is reasonable and fully in accord with congressional intent."[241]

The court also rejected petitioners' argument that the HRS was arbitrary and capricious. In particular, the court was unimpressed with petitioners' argument that because the HRS was designed primarily with chemical substances in mind, it could not be applied to releases of mining wastes. The court did not delve deeply into EPA's detailed responses to the challenges to the HRS. Stressing the fact that the agency must be prepared to explain the assumptions and methodology of its models, the court stated that it must ultimately "defer to the agency's decision on how to balance the cost and complexity of a more elaborate model against the oversimplification of a simpler model."[242]

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[239] 759 F.2d 905 (D.C. Cir. 1985).

[240] Id. at 919.

[241] Id. at 921.

The committee and its staff should begin with a relatively long list of potential candidates for its priority list and it should at the end of a relatively short period of time (perhaps six months) produce a ranked or graded list for circulation and comment. After the first list has been completed, the committee should continue to monitor scientific reports and other developments for information that might cause the agency to change the list. In particular, the committee should have systematic access to reports from the field for indications that issues not on the list deserve greater agency attention. OSHA should therefore continue its efforts to make information from the field more accessible to agency decisionmakers.

To preserve needed flexibility, OSHA should establish an additional "side window" for workplace hazards for which important policy considerations warrant rapid treatment.[243] Petitions for rulemaking and TSCA referrals would then be treated as petitions to amend the current priorities list to which OSHA would respond within a definite time period (perhaps 120 days).[244] OSHA could promulgate procedural regulations governing petitions and TSCA referrals specifying criteria for giving expeditious treatment to a topic rather than proceedings through the normal (and presumably slower) process of regular committee deliberations on the status of the priorities list. Such criteria might include: (1) the degree of hazard; (2) the quality of the data indicating hazard; (3) the administrative resources required to undertake the new project; (4) the match between the expertise required for the project and the expertise available to the agency;[245] (5) whether the proposed project would result in greater protection for workers than projects currently at the top of the list; and (6) other important public policies (allowing room for delicate political considerations).

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[242] Id. at 921, quoting Small Refiner Lead Phasedown Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983).

[243] Seminario Interview, supra note 131; Sampson Interview, supra note 134. For a description of a "fast track" system for addressing rulemaking petitions at the Nuclear Regulatory Commission, see Luneberg, supra note , at 86-88. Petitions on the "fast track" must be answered within 90 days, and a favorable response results in a notice of proposed rulemaking, rather than the typical notice of receipt of petition.

[244] The ability of EPA to specify a response time for TSCA referrals might confound OSHA's attempt to establish a definite deadline, but EPA and OSHA should be able to agree to a sensible limit such as 120 days.

[245] Mazzuzkelli Interview, supra note 164.

The side-window process could rely heavily upon the committee suggested earlier. The appropriate side-window vehicle might be a petition to amend the list. OSHA could, for example, promulgate regulations governing petitions for rulemaking that would require a showing from the petitioner that the subject of the petition warranted more rapid treatment than the other projects on the priorities list. The committee could then examine the reasons and any other outside comments on the petition in deciding whether to amend the priorities list.

Since policy considerations weigh very heavily in decisions whether to change agency priorities, OSHA may prefer to have a side-window vehicle available that does not rely upon a committee, especially if the original prioritization committee includes outsiders. Petitions could, for example, be directed to the Assistant Secretary or some high level entity composed of a Deputy Assistant Secretary, the Directors of the relevant Directorates and other relevant support staff. This alternative would allow the persons most directly accountable for the use of agency resources and those most sensitive to the political process outside the agency to make the decision whether a topic is sufficiently "hot" to leapfrog other topics.

Whether OSHA allows a quasi-expert committee or a high level internal entity to implement the side-window procedure, it should provide explicit public responses to petitions to change priorities, and these responses should give the reasons for accepting or rejecting such petitions. The side window must not become the dominant source of rulemaking initiatives. Its very nature means that the agency's responses to side window petitions will be less easily explained than the more quantitative "front door." In the final analysis, this means that the agency must show the public, and especially beneficiaries, that the more rational "front door" process does in fact work, bringing rulemaking initiatives to completion on a regular basis. In other words, OSHA must manage the rulemaking process in such a way that the front door is not perceived to be a "black hole" into which rulemaking efforts enter, never to be heard from again.

> RECOMMENDATION: OSHA should establish a process for expediting prioritization decisions for topics that are the subject of TSCA referrals, rulemaking petitions, and intense pressure from Congress, OMB, and the White House. Although this expeditious process should be separate from the agency's routine prioritization process, it should be closely integrated with the routine process. The outcome of the expedited process should be the placement of the topic on the priority list or a determination not to proceed ahead with the project and a public explanation

for the action.

Once OSHA establishes a workable process for prioritizing future projects that is sufficiently flexible to address legitimate requests for priority changes and once OSHA begins to implement that process consistently, it should have little to fear from a lawsuit requesting a court to order it, in effect, to move a project to the top of the list. The agency can simply reply that it has an orderly process for ranking projects and a flexible way to hurry up individual projects when speed is necessary, and the petitioner's project has been assigned a place on the agency's agenda. The burden should then be on the petitioner to demonstrate why its proposed project warrants special treatment.

OSHA should attempt to coordinate its priority-setting activities with NIOSH.[246] Congress clearly intended in section 6(g) of the Occupational Safety and Health Act that NIOSH play a role in providing the technical basis for OSHA priority setting.[247] OSHA should solicit NIOSH's input in assembling an initial prioritization list. If, for example, OSHA decides to establish a committee to set priorities, it should appoint an official from NIOSH to a position on the committee. OSHA should communicate its priorities at a very early stage, so that NIOSH may schedule its projects to complement OSHA's rulemaking efforts. More importantly, OSHA should attempt to adhere to its original prioritization plan as closely as possible to avoid the frustration that NIOSH staffers feel when they prepare a criteria document for a substance only to be told that it is no longer a high OSHA priority.[248] OSHA will never be able to adhere completely to any set prioritization scheme. Changes in priorities will be necessary to meet changed political conditions and crises brought on by new information. Therefore, OSHA should work with NIOSH to add some flexibility to NIOSH's schedule. In particular, NIOSH should maintain a capacity to respond on a "fast track" to OSHA requests for technical help on projects that come through the "side window." Most importantly, OSHA and NIOSH should be in constant communication so that NIOSH may adapt to changes in OSHA's priorities.[249]

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[246] See Delays in Setting Standards, supra note 49, at 21 (recommending that OSHA and NIOSH work together in establishing priorities).

[247] 29 U.S.C. §655(g).

[248] Mazzuzkelli Interview, supra note 164; Sevin Interview, supra note 133.

[249] Mazzuzkelli Interview, supra note 164.

> RECOMMENDATION: OSHA should include NIOSH in drafting its initial priority list and it should make NIOSH aware of all changes to that list. OSHA should work with NIOSH to establish a capacity in NIOSH to respond rapidly with information on projects that are assigned to move on a fast track through OSHA.

OSHA should also coordinate carefully with the National Toxicology Program (NTP)[250] and EPA concerning OSHA's future information needs. Both NTP and EPA have the capability of generating new information on suspect chemicals, a capacity that OSHA lacks.[251] If OSHA could arrive at a priorities list that extended three or four years in the future, it could approach NTP or EPA to initiate studies on the chemicals that would be the subjects of future rulemaking initiatives. OSHA should also coordinate with EPA on regulatory matters when OSHA's authority to protect works may not be as effective as EPA's authority to regulate chemicals.[252]

> RECOMMENDATION: OSHA should attempt to enter into a formal interagency agreement with EPA and NTP for making EPA and NTP aware of OSHA's needs for testing toxic substances to which workers are exposed. OSHA should also attempt to enter into a formal interagency agreement for coordinating the exercise of the authorities of the two agencies in a way that most effectively protects employees from workplace risks.

Although OSHA has undertaken some modest informal efforts in the last six years to coordinate with other agencies, there is no formal institutional entity with the capability of ensuring appropriate communication and forcing necessary cooperation. The interaction that does occur is often at lower levels where bureaucratic turf considerations overwhelm the current meager incentives to cooperate. For example, EPA employees are inclined to regard OSHA scientists as less competent than EPA scientists, and OSHA personnel generally believe that EPA scientists and engineers do not know much about the workplace.[253] A 1982 Recommendation of the Administrative Conference encouraged interagency coordination in identifying, evaluating and regulating potential human carcinogens, stressing that "[e]ffective coordination can reduce governmental costs, minimize inconsistency among the agencies, and better illuminate the economic costs of alternative control options.[254] During the Carter Administration, an Interagency Regulatory Liaison Group, which was composed of the heads of OSHA, EPA, FDA, CPSC, FSIS, provided the institutional impetus to cooperate. OSHA should pursue the possibility of reviving the IRLG or of creating a similar entity to perform the coordination function suggested here.

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[250] The National Toxicology Program is a multi-agency chemical testing program housed in the Department of Health and Human Services. It accepts nominees from regulatory agencies for testing chemicals for health effects. The purpose of the program, which was established in the late 1970s, was to coordinate governmental needs for health and safety testing of potentially dangerous chemicals.

[251] Seminario Interview, supra note 131.

[252] Seminario Interview, supra note 131.

Establishing an IRLG-like coordinating institution would require some additional resources in resource-scarce times, but the savings in avoided duplication alone should be worth the cost. The most foreboding obstacle to setting up such an institution is likely to be the Office of Management and Budget, which believes that it currently plays this coordinating role. The short answer to this objection is that OMB has had since the abolition of the old IRLG in 1981 to fill the gap, and it has not done so. Nor have other White House efforts to generate coordinated policies in the areas of regulating carcinogens and biotechnology met with great success. The coordination function for OSHA standard setting must be initiated and operated by the agencies themselves, and it must have the support and active participation of officials at the very highest levels of those agencies.

> RECOMMENDATION: OSHA and other health and environmental agencies, such as EPA, the Food and Drug Administration, the Food Safety and Inspection Service and the Consumer Product Safety Commission, should form a high level group charged with coordinating agency policies and information relevant to regulating health and environmental hazards.

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[253] Seminario Interview, supra note 131.

[254] Recommendation No. 82-5, 1 C.F.R. §305.82-5 (1986).

III. Management and Accountability.

OSHA has always struggled with managing its rulemaking process expeditiously.[255] Although the extraordinarily lengthy interval between initiation and publication of OSHA rules has been the subject of negative commentary for years, the agency seems no closer to a solution than it was in the mid-1970's. Table III sets out in time-line form some of OSHA's important rulemaking efforts. The table strongly suggests that OSHA has a very difficult time meeting its own commitments for completing rulemaking efforts. The Generic Carcinogen Policy, described in Part II of this Report, had the potential to speed up the process for chemicals that demonstrated carcinogenic potential, but the Benzene case[256] significantly reduced the impact of that approach when it imposed a requirement that OSHA demonstrate that workplace risks pose a "significant risk" before regulating.

Although OSHA's management style has varied over the years, no single approach has successfully speeded up the agency's rulemaking efforts. This suggests that some of OSHA's problems may be systematic or externally imposed. However, OSHA can significantly improve its internal management, and such improvements should substantially reduce the incidence of grossly delayed rulemaking initiatives. This section of the Report will critically examine management and accountability problems in OSHA and explore some options for improvement.

TABLE III
SIGNIFICANT MILESTONES IN FIVE RECENT OSHA RULEMAKINGS

Asbestos--Revision of 1972 Standard

early 4/83:	OSHA (Auchter) promises to issue NPRM in summer of 1983 (update of a 1975 proposal) and publish final rule in fall 1983 (as opposed to team's targets of June, 1984 and September, 1985
11/2/83:	Emergency Temporary Standard (0.5 standard) issued for 6 months

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[255] See Delays in Setting Standards, supra note 49, at 23 ("The Occupational Safety and Health Administration did not have an adequate management information system and controls to identify and resolve the problems which delayed completion of standards.")

[256] 448 U.S. 607 (1980).

3/7/84: Fifth Circuit invalidates Emergency Temporary Standard

3/29/84: OSHA (Strobel) promises NPRM within a week

4/10/84: NPRM published (still undecided between 0.5 or 0.2 fibers/cm3)

10/2/84: New Emergency Temporary Standard issues (0.2 to 0.5)

9/26/85: OSHA (Tyson) promises final standard by end of October, 1985

10/17/85: OSHA advisory committee recommends 0.1 standard for construction industry

6/13/86: Final standard promulgated (0.2 fibers/cm3).

Benzene

4/1/83: Report of OSHA intent to announce proposal for stiffer standards on 5/1/83

4/14/83: Petition for an emergency temporary standard

5/3/83: OSHA (Auchter) announces plans to promulgate standard by summer, 1984 (and to decide on emergency temporary standard within 3 or 4 weeks)

5/2/83: OSHA promises ANPR within 2 weeks

7/1/83: OSHA rejects emergency standard request

7/8/83: OSHA (Auchter) proposes expedited rulemaking program, i.e., proposal by 11/83, hearings in 2/84, final rule by 6/84

3/84: OSHA says NPRM should be submitted to OMB within a few weeks

4/12/84: OSHA predicts that it will take "another couple of months" before publishing NPRM.

7/84: OSHA says that the preamble to proposed standard is being changed

12/10/84: Suit filed in U.S. Court of Appeals, D.C. to compel OSHA to issue NPRM.

3/19/85: Draft NPRM submitted to OMB

4/22/85: OSHA files response to suit

5/20/85: OMB extends review of standard 'indefinitely'

2/25/86: Court of Appeals, D.C. refuses to put OSHA on timetable: 14 month timetable contemplated by OSHA not "facially unreasonable"

Ethylene Oxide

1/5/83: District Court orders OSHA to promulgate Emergency Temporary Standard

3/15/83: D.C. Circuit gives OSHA 30 days to propose tighter ethylene oxide standard. No firm timetable established, but court expects final rule within a year

3/30/83: Draft NPRM (1 ppm) completed

4/15/83: OSHA issues NPRM in response to court order

4/17/84: OSHA agrees (and court approves) to promulgate new standard by 6/15/84

6/18/84: OSHA issues final rule

Ethylene Dibromide

fall/81: OSHA denies petition for Emergency Temporary Standard

12/1/81: OSHA issues ANPR

5/19/83: Risk assessment recommends reduction from 20 ppm to 0.1 ppm/STEL = 0.5 ppm

6/22/83: Auchter letter promises NPRM rule to be issued by mid-summer, 1983

9/13/83: Auchter testifies OSHA moving with all deliberate speed

9/29/83: OSHA issues NPRM

8/7/84: OSHA spokeswomen promises final rule in late fall, 1984

Formaldehyde

5/13/82: OSHA response to NIOSH concludes that there is insufficient evidence to support a more stringent standard

8/25/82: UAW files complaint in D.C. Cir. seeking emergency regulation and charging OSHA with excluding necessary data from public record.

8/15/83: UAW files motion for summary judgment in its action to force OSHA to promulgate emergency temporary standard

5/84: EPA risk assessment indicates exposure would result in additional cancer cases

7/2/84: Court orders OSHA to reconsider need for Emergency Temporary Standard

7/2/84: OSHA tells court it needs until 12/15/84 for ETS reconsideration and until 4/15/85 for permanent rule reconsideration

10/30/84: OSHA tells court it is 'behind schedule,' but will get decision on ETS made by 12/15/84

11/84: OSHA releases "preliminary assessment"

12/15/84: OSHA fails to meet deadline

1/12/85: OSHA announces it will not issue ETS

4/15/85: OSHA announces it is considering new rules

5/7/85: OSHA says no justification for court ordered acceleration of rulemaking

6/3/85: D.C. Circuit orders OSHA to take 'appropriate further action' toward issuing permanent standard by 10/1/85

10/1/85: OSHA tells D.C. Circuit it needs extension til

12/1/85

10/18/85: OSHA tells court it is not delaying unduly

11/8/85: D.C. Circuit orders OSHA to promulgate NPRM by 12/1/85

12/3/85: OSHA issues NPRM (1.5 ppm)

1/24/86: OSHA asks D.C. Circuit to deny UAW motion for final rule by 9/10/86

A. Evaluation of the Current Rulemaking Management System.

OSHA has traditionally been organized along functional lines, maintaining separate Directorships for Health Standards, Safety Standards, Technical Support, Field Operations, and Administrative Programs. Although OSHA has always had a separate office for "Administration," that office has generally been responsible for preparing agency budgets, maintaining agency facilities and operations, and administering the financial aspects of agency contracts. It has never played a role in managing rulemaking initiatives. In the late 1970s, OSHA created a separate Directorate for Policy and charged it with preparing economic feasibility studies and regulatory impact assessments. While this office plays a large role in agency rulemaking initiatives, it does not attempt to manage the process.

OSHA is only one of many agencies in the Department of Labor, and it must clear important rulemaking actions at the Departmental level. The Department has always maintained a separate Solicitor's Office, apart from the individual operating agencies, to provide legal advice to all of the agencies within the Department.[257] The agencies do not have their own lawyers, and they are entirely dependent on the Solicitor's Office for legal advice.

In its early years, OSHA was a very loosely run organization, and especially so in its rulemaking functions.

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[257] The Solicitor's Office is also the designated contact with OMB for all agencies in the Department.

Unlike other health and environmental agencies created in the early 1970s, OSHA faced few congressionally mandated deadlines.[258] Rulemaking initiatives were generated internally in an ad hoc fashion. The Directors for Health and Safety Standards assumed control of rulemaking initiatives with substantial and continuing input from the Assistant Secretary. Loose internal work groups were assembled to draft rulemaking documents with the aid of consultants.[259] On at least one occasion (the original hazard identification regulation) an outside consultant (a university professor) was the de facto head of the work group. Since the agency undertook few major projects at any given time, the Directors themselves played a very substantial role in the drafting process, even to the point of typing the final version of a rule at 4:00 AM on the morning that it was due.[260] Clearly a process that devoted such large amounts of upper management time to individual rules was incapable of managing more than five or six major rules at any one time. As a practical matter, the tendency was for the entire agency to "gear up" for a single rulemaking effort, putting aside most other initiatives until the current effort reached a clear stopping point.[261] The result was a fairly low production of rules. Even during the Carter Administration, when an activist Assistant Secretary headed a more activist agency, it completed very few rules in any given year.

The change of Administrations in 1981 brought three significant organizational changes to OSHA. First, the Secretary of Labor took a much more active interest in OSHA rulemaking, and Departmental procedures were established for reviewing OSHA activities. Second, OSHA's new management hired a management consultant to prepare standardized written procedures for OSHA rulemaking that stressed documentation and upper level management input. Third, Executive Order 12291 (and later Executive Order 12498) gave the Office of Management and Budget a significant review role that in some cases superceded the agency's own judgment and that in many cases significantly delayed the publication of proposed rules.

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[258] OSHA was required to promulgate national consensus standards within two years from the date of the statute's enactment. 29 U.S.C. §6(a).

[259] Wrenn Interview, supra note 49; Gordon Interview, supra note 129.

[260] Wrenn Interview, supra note 49.

[261] Wrenn Interview, supra note 49; Gordon Interview, supra note 129.

The new Secretary of Labor in 1981 also revised Departmental procedures to establish a Department-wide Policy Review Board to review all policy and regulatory initiatives and to facilitate upper level Departmental input into the regulatory process.[262] The Secretary of Labor chairs the Policy Review Board and the Assistant Secretary for Policy serves as its Executive Director.[263] At the time that OSHA begins to devote staff or other resources to a rulemaking effort, current Departmental procedures require it to prepare a "Concept Analysis Paper" to inform Departmental officials and to aid in Departmental tracking of pending regulatory issues.[264] After the agency has decided to initiate a rulemaking effort, it must prepare an Options Memorandum for the Policy Review Board.[265] Based upon the Options Memorandum, the Policy Review Board must provide policy guidance before the agency may publish a Notice of Proposed Rulemaking.[266]

1. The 1982 Regulation Management System.

In 1982, OSHA developed its own Regulation Management System to complement the Departmental procedures for generating rules.[267] The Procedural Directive that established the

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[262] See, Memorandum from Raymond J. Donovan to the Executive Staff on Improving the Management and Policy Processes Within the Department, November 17, 1982 [hereinafter cited as Improving Management Memo]; Memorandum from John Cogan to Members of the Secretariat of the Policy Review and Coordinating Committee on PRCC Operating Procedures, November 29, 1982 [hereinafter cited as PRCC Procedures Memo].

[263] Its other members include the Secretary's Chief of Staff (who chairs the meetings in the Secretary's absence), the Under Secretary, the Solicitor, the Assistant Secretary for Administration and Management, the Assistant

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[264] Memorandum from Raymond Donovan to Executive Staff on Departmental Decision Making Procedures -- Overall

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[265] Departmental Procedures Memo, supra note 456, at 1.

[266] PRCC Procedures, supra note 454, at 2.

[267] OSHA Instruction RUL.1, March 1, 1982 [hereinafter cited as OSHA Instruction RUL.1].

Regulation Management System strongly endorsed the position that rules should not be initiated or completed unless they addressed demonstrable significant risks, were based upon documented facts, and were cost effective. The Directive established a Regulation Review Committee composed of high level OSHA officials and charged it with "coordinating issues among the directorates and reviewing documents and issues resulting from the standards development process prior to the Assistant Secretary's review."[268] The Committee was supposed to recommend to the Assistant Secretary whether the agency should go forward with a rulemaking initiative. The Committee did not, however, always come to closure, and some ideas were effectively tabled indefinitely.

If the Assistant Secretary decided to go forward with a rulemaking effort, the Regulation Review Committee was supposed to appoint a "Preliminary Team," composed of a technical person from the Health or Safety Directorate, an attorney from the Solicitor's Office, an analyst from the Policy Directorate, and other employees with particular expertise, to prepare a "Research and Analysis Plan" and "Part I of the Assistant Secretary's Summary."[269] The Research and Analysis Plan was meant to be "an outline of the facts to be documented and analyses to be made to justify a standard,"[270] and was to be "be based on available or easily attainable information and an outline of the factual bases and issues which need to be addressed."[271] The Assistant Secretary's Summary was intended to provide the Assistant Secretary with a concise summary of the crucial information and issues being developed in the rulemaking process. Part I of the Summary set out the nature of the proposed action, the justification for that action, alternatives to the action, and groups with an interest

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[263] Secretary for Employment and Training Administration, and the Deputy Under Secretary for Intergovernmental Affairs. Improving Management Memo, supra note 454, at 1.

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[264] Policies, October 23, 1981 [hereinafter cited as Departmental Procedures Memo].

[268] OSHA Instruction RUL.1, supra note 267, at III-2.

[269] OSHA Instruction RUL.1 supra note 267, at III-4, III-8.

[270] OSHA Instruction RUL.1, supra note 267, at V-7.

[271] OSHA Instruction RUL.1, supra note 267, at V-7.

in it.[272] The Rulemaking Directive allowed 5 to 10 staff days for this effort,[273] but it usually took approximately two months.[274]

If the Assistant Secretary decided to pursue the rulemaking effort further, the Regulation Review Committee would assemble a new "Regulation Team" to complete the agency's standard-setting process. Team leaders could come from any of the Offices within the Health or Safety Directorates.[275] Although the team leader was responsible for the rule, he or she did not have direct authority over any of the individual team members.[276] It was not unusual for one of the members of a team to outrank the team leader in the bureaucratic hierarchy.[277] Thus, while the team leader gave assignments to various team members, he or she had no authority to ensure that the assignments were completed on time.

The team's first task was to prepare a "Workplan" and Part II of the Assistant Secretary's Summary. The Workplan described the resources that would be required to complete the rulemaking project and provided a schedule of activities. It was subject to amendment as resource requirements and deadlines changed. The Workplan in theory committed the Regulation Team to a definite schedule with which upper level management could measure progress against time and resource commitments.

After the Regulation Review Committee and the Assistant Secretary approved the Workplan and Part II of the Assistant Secretary's Summary, the Team was required to undertake a risk analysis and an alternatives analysis. The Team summarized these analyses and recommended a course of action in an Action Recommendation for the Regulation Review Committee and the Assistant Secretary. If necessary, a revised Workplan was also submitted and approved.[278] The Action Recommendation was intended to be the primary decision document within the agency.[279] Following approval of the Action Recommendation, the Regulation Team proceeded in accordance with the (possibly amended) Workplan to draft the Notice of Proposed Rulemaking under the direction of the relevant Standards Director. The team leader would assign to a member or members of the Team the task of incorporating all of the information that the Team had considered into a Preamble for the Notice of Proposed Rulemaking. How the task of drafting the Notice of Proposed Rulemaking was assigned varied from team to team. Sometimes the team leader would draft the notice, and sometimes the task would be divided among members with particular expertise.[280] During the same time period that the Regulation Team was deliberating over the contents of the proposed rule, the representative from the Office of Regulatory Analysis in the Policy Directorate would draft the preliminary regulatory analysis documents.[281]

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[272] The Preliminary team was also assigned the job of preparing the Concept Analysis Paper for Departmental review.

[273] OSHA Instruction RUL.1, supra note 267, at V-7.

[274] Telephone interview with Robert Beliles, Office of Risk Assessment, Directorate of Health Standards Programs, OSHA (July 23, 1984).

[275] The remainder of the Regulation Team was composed of representatives from the Solicitor of Labor, the Policy Directorate, the Office of Regulatory Analysis in the Policy Directorate, the Technical Directorate, the Training Directorate, and the Information Office. OSHA Instruction RUL.1, supra note 267, at V-6.

[276] Telephone interview with Arthur Gas, Office of Risk Reduction Technology, Directorate of Health Standards Programs, OSHA (July 23, 1984).

[277] Gas Interview, supra note 276.

Finally, the Team had to draft a second Options Memorandum to accompany the rulemaking package through Departmental Review.[282] Since the Policy Review Board had by now already had one opportunity to examine the rulemaking effort and since the agency's effort was virtually complete, only minor changes to the rulemaking documents were usually necessary at this point. The Notice of Proposed Rulemaking Package and these related documents were then reviewed by the Regulation Review Committee, the Assistant Secretary, the Policy Review Board and sent to OMB for further review.[283]

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[278] OSHA Instruction RUL.1, supra note 267, at III-13.

[279] Telephone interview with Gary Strobel, Special Assistant to the Assistant Secretary for Regulatory Affairs, OSHA (July 23, 1984). The team also drew upon the Risk Analysis and the Alternatives Analysis in preparing an Options Memorandum for Departmental review. Since the contents of the Options Memorandum was almost identical to the contents of the Action Recommendation, this task was not especially burdensome. Although it no longer prepares an Action Recommendation, OSHA staff must still prepare an Options Memorandum for Departmental review. So the same analytical work is performed, but it need not fit the precise contours of the Action Recommendation.

[280] Beliles Interview, supra note 274.

[281] Beliles Interview, supra note 274.

[282] OSHA Instruction RUL.1, supra note 267, at III-15.

2. The Current System.

The above-described 1982 internal procedures for OSHA rulemaking are best described as "byzantine." In the opinions of several OSHA employees, it must have reflected a strong desire on the part of upper level management to slow down the agency's already ponderous internal rulemaking process. Its excessive documentation requirements and its repetitive review procedures provided almost insuperable barriers to the production of rules, and in fact only one rule of any consequence was produced during the 3-4 years that those procedures were in place.[284] The internal procedural rules also represented a more subtle effort to take authority from the Health and Safety Directors and shift it to the Assistant Secretary's Office.[285] They also gave the Assistant Secretary's Office greater power to control the direction of a rulemaking effort through the ability to appoint team leaders.[286]

In any event, the intricate rules were after a time observed mostly in their breach. In practice, these formal preliminary procedures were largely ignored.[287] The Regulation Review Committee was often bypassed as the Assistant Secretary directly ordered the Directorates to begin rulemaking initiatives.[288] The Research and Analysis Plan, the

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[283] OSHA Instruction RUL.1, supra note 267, at III-15.

[284] The only major rule to be promulgated during the period was the Hazard Identification Standard, 48 Fed. Reg. 53280 (1983).

[285] Stein Interview, supra note 123; Silk Interview, supra note 224; B. White Interview, supra note 59.

[286] Stein Interview, supra note 123.

[287] The procedures were never observed for safety standards, which proceeded sequentially from the Safety Directorate (which drafted the bulk of the standard) to the Policy Office, to the Solicitor's Office and back to the Safety Directorate. Gordon Interview, supra note 321; B. White Interview, supra note 59.

[288] Frodyma Interview, supra note 66.

Assistant Secretary's Summaries and the Concept Analysis Papers were either ignored or treated in a very cursory fashion, and in many cases no Preliminary Team was ever appointed. High level input was secured through informal meetings with the Assistant Secretary for which the members of the team prepared memoranda and charts to lay out the issues and options, and the Assistant Secretary often decided the important issues on the spot.

By late 1985, the procedures were as a practical matter irrelevant to the real world rulemaking process. Not only had they effectively stymied rules aimed at enhancing workplace safety, they had also sidetracked efforts aimed at repealing or amending existing rules to make them less burdensome. In addition, OSHA was by 1985 receiving a great deal of congressional pressure to begin promulgating rules, and it had received several court orders to complete internal decision making by specified dates. With rulemaking projects increasingly subject to court-ordered deadlines, the agency was forced to abandon the 1982 procedures or face the threat of being held in contempt of court.289/ One of Assistant Secretary Rowland's last official acts was to abolish the intricate internal procedures described above.290/ However, the Departmental procedures, establishing the Policy Review Board and requiring the preparation of a Concept Analysis Paper and Options Memoranda still remain in effect.

The 1982 procedures have not been replaced with any particular management regime.291/ Although the "team" concept was abolished and although responsibility for rulemaking was returned to the Health and Safety Standards Directorates, the project officers who are responsible for particular rulemaking efforts often establish de facto teams made up of representatives from the Policy Office, the Solicitor's Office and other persons from the Health and Safety Standards Directorates with expertise in the subject area.292/ While many of the subsidiary documentation

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289/ Sevin Interview, supra note 133.

290/ Silk Interview, supra note 224; F. White Interview, supra note 59; Martonik Interview, supra note 59. Memorandum entitled "Management Responsibility for Standards," dated July 24, 1985; OSHA Instruction RUL. 1, supra note 267, Chapter 2.

291/ F. White Interview, supra note 59.

292/ Sevin Interview, supra note 133; Stein Interview, supra note 123; Silk Interview, supra note 224; Harwood

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requirements, such as the Research and Analysis Plan, the Assistant Secretary's Summary and the Action Recommendation, have disappeared as formal documents, a good deal of communication still occurs on a less formal basis between the Assistant Secretary's Office and the staff person with responsibility for the initiative through the Health and Safety Directors. An Options Memorandum is still prepared for the Assistant Secretary and for review by the Departmental Policy Review Board.[293] Deadlines still get established informally, but they are less often reduced to writing in formal documentation such as the Work Plan. Project officers in the Health Standards Directorate usually prepare Work Plans, which contain proposed deadlines, and these are updated regularly (usually in a monthly basis).[294] Still, these internally set deadlines usually slip without serious penalty.[295] The time interval between when OSHA receives a rulemaking petition or otherwise decides to examine a possible rulemaking topic and the time that it writes the Options Memorandum depends almost entirely upon the amount of outside pressure the agency receives,[296] even though there is no apparent reason why a deadline for preparing a Notice of Proposed Rulemaking could not be established at the time that the Assistant Secretary decides to go forward with a rulemaking project.[297]

Despite the elimination of the burdensome 1982 paperwork requirements, the agency's internal production has speeded up only slightly. While it is very clear that the 1982 procedures failed utterly to achieve expeditious rulemaking, OSHA still

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[292] Interview, supra note 138; F. White Interview, supra note 59; B. White Interview, supra note 59; Martonik Interview, supra note 59; Gordon Interview, supra note 129.

[293] Stein Interview, supra note 123; Harwood Interview, supra note 138; Martonik Interview, supra note 59.

[294] Martonik Interview, supra note 59. In addition, the office of the Director of the Health Standards Directorate keeps a running account of who is responsible for which projects. Martonik Interview, supra note 59.

[295] Martonik Interview, supra note 59; Sevin Interview, supra note 133; Harwood Interview, supra note 138.

[296] See also text accompanying notes 130-135, supra.

[297] Gordon Interview, supra note 129.

needs a management and accountability system to ensure that upper level management's priorities are communicated to lower level staff, to ensure that bottlenecks do not develop, and to ensure that responsible agency officials are held accountable for inexcusable delays. Whether or not OSHA ever seizes control of its own agenda, it must invent an internal management system that makes the trains run on schedule.

To accomplish this result, OSHA management must seriously address at least six severe management problems that currently plague OSHA's internal rulemaking management process: (1) the absence of effective mechanism for establishing and monitoring deadlines for achieving internal milestones; (2) inadequate incentives to meet established deadlines; (3) the absence of a mechanism for facilitating policy interchange between upper level management and lower level staff; (4) the lack of coordination among essential institutional actors; (5) the inability or unwillingness of upper level management to make difficult substantive decisions in a timely fashion; and (6) inadequate resources.

B. Establishing and Monitoring Deadlines.

1. The Current Absence of Deadlines

As previously discussed, OSHA's statute does not provide firm deadlines for rulemaking actions. Thus, internally generated rules need not proceed in accordance with any legally required timetable. Likewise, matters brought to OSHA's attention through NIOSH criteria documents, Congressional and White House pressure, and updated private standards need not proceed in accordance with any legally enforceable deadlines. OSHA must respond to TSCA referrals within a deadline established by EPA, but there may be no judicial relief available for missed deadlines. In any event, the agency is only required to decide whether or not it will undertake a rulemaking; it does not have to set out or adhere to a timetable for completing the action. External petitions are subject to the Administrative Procedure Act's requirement that the agency respond to rulemaking petitions within a "reasonable time."[298] but judicial enforcement of this flexible standard is expensive and time consuming. Judicial relief is generally available under the Administrative Procedure Act for agency actions "unreasonably delayed," but judicial intervention into an ongoing administrative activity that lacks a statutory deadline is easily fended off, absent egregious circumstances.[299] Only in very rare instances have the courts ordered regulatory agencies to complete rulemaking activities by judicially established deadlines when the agency's own statute lacks a deadline. Interestingly, a large number of these cases involve OSHA rulemaking.

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[298] Section 555(b) of the Administrative Procedure Act requires that agencies conclude matters presented to them "within a reasonable time," and Section 706(1) provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §§555(b), 706(1).

At present, OSHA has in place only the most rudimentary system for setting deadlines for its regulatory activities.[300] The Work Plan that some project officers prepare at the outset of a project[301] and the Options Memorandum that is prepared for Departmental review contain a proposed timetable, but these deadlines are never formally affirmed and they are rarely enforced. Upper level management meets twice a year to prepare the agency's proposed regulatory agenda for submission to Departmental officials and OMB. This document establishes proposed deadlines for actions on the agenda, but those deadlines are not regarded seriously by most agency employees, and they are in any event only very rarely met in practice.[302] Some are established to meet political needs and are therefore often very unrealistic. Others are proposed solely out of the necessity for putting a date on the chart without any serious thought about whether they are realistic or about whether the agency truly intends to spend current resources in an effort to attain them.

The deadlines taken most seriously by agency staff are those set in informal status meetings with the Assistant Secretary or Deputy Assistant Secretaries and the Directors of Health and Safety Standards and Policy Directorates.[303]

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[299] See, e.g., United Steelworkers of America, AFL-CIO v. Rubber Manufacturers Ass'n, 783 F.2d 1117 (D.C. Cir. 1986) (declining to disturb agency's proposed schedule for completing rulemaking). See also Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir,

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[300] Sevin Interview, supra note 133; Harwood Interview, supra note 138.

[301] Silk Interview, supra note 224; Stein Interview, supra note 123; Harwood Interview, supra note 138.

[302] Most of the lower level employees interviewed for this report put very little stock in the Regulatory Agenda deadlines.

[303] Braslow Interview, supra note 123.

These meetings, however, occur as various milestones, such as the preparation of the Options Memorandum, are met, and not at specific pre-arranged time intervals. They are therefore not effective as "action-forcing" devices. Time projections are typically arrived at on a "when-do-you-think-you-can-get-this-done" basis and they are not always reduced to writing. In addition, they are continually subject to informal adjustment without explanation as priorities change due to outside pressures or other resource needs.[304] These informal deadlines and amendments to the deadlines are communicated informally by the Office Directors to the staff members who are assigned to particular rules and who in turn communicate them to other staff members. Apart from the unobserved deadlines published in the Regulatory Agenda, the agency generally avoids publicizing its internally generated deadlines.

When the Policy Office or Health Standards Directorate contracts for outside work, as is usually the case for important projects, deadlines are imposed on agency contractors. But the realistic time requirements of the contractors are not always factored into the agency's rule generating process.[305] Sometimes contractors are given indefinite extensions for jobs related to projects that wind up on the back burner, and indeed the delayed contractor's report can be cited an excuse for delaying agency action. At the other extreme, contractors are pushed to produce fairly low quality output within unrealistically short deadlines when outside pressures force the agency to act expeditiously.[306] A more deliberate attempt to set and adhere to deadlines could improve the quality of the jobs that contractors perform for the agency.

The problem of the lack of deadlines is especially acute after the agency has held a hearing on a proposal and is formulating its final rule in response to the public comments.[307] After a hearing date has been set (perhaps as

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[299] 1984) (establishing a "rule of reason" for determining
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[304] Sevin Interview, supra note 133; Harwood Interview, supra note 138.

[305] Gordon Interview, supra note 129.

[306] Gordon Interview, supra note 129.

[307] Gordon Interview, supra note 129; Stein Interview, supra note 123; Harwood Interview, supra note 138.

a result of a court order), the agency staff does have a deadline, and the prospect of a public hearing generates a good deal of excitement and activity as the staff prepares witnesses and works on its cross-examination. As the hearing draws near, agency staffers work overtime preparing the best case possible for the agency's position. But after the hearing is finished, there is a period of time during which the agency awaits post-hearing comments. Staff members working on the rule turn to other matters, like answering backed-up correspondence and initiating new rulemaking projects. After the hiatus, there is a general reluctance to return to the nitty gritty work of reading hundreds or thousands of comments and preparing agency responses to those comments for publication in the preamble to the final rule. In the absence of a firm deadline for finishing this task, it tends to drag on as staff members who excitedly worked on the rule prior to the hearing allow the project to slip in their priorities.

Without deadlines, it is always possible for lethargic staffers or professionals busy on other projects to put things off to another day. Moreover, because most of the science/policy questions that must be resolved in OSHA rulemaking are inherently unresolvable on technical grounds, it is always possible for someone on the technical staff to suggest that the project wait until more information can be developed. There is always one more criticism that bears answering.[308] Similarly, it is possible for upper level management in the absence of stated deadlines to allow controversial issues to slide until further information can be developed and, perhaps more importantly, until political passions cool.

OSHA does not have any systematic approach toward tracking the progress of its rulemaking initiatives.[309] The project officer from the Health or Safety Standards Directorate is responsible for keeping the action on schedule, and the Director maintains close enough contact with the staff to know which actions are on track and which actions are slipping. The Office of the Assistant Secretary does not currently have a formal way of ascertaining on a periodic basis the status of OSHA's rulemaking. Although the agency no longer focuses its

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[299] the time required to make agency decisions); Schwartz, supra note 135, at 45.

[308] Sevin Interview, supra note 133; Stein Interview, supra note 123; Harwood Interview, supra note 138.

[309] F. White Interview, supra note 59. See also Delays in Setting Standards, supra note 49, at 23-24.

short term attention primarily on one or two big rules as it did in the late 1970s, it does not have a tracking system to keep up with the progress of rules. As one official explained: "We keep it in our heads."[310]

Sometimes rules that are kept in the heads of agency officials get lost. On one occasion a project was literally lost in the Department for several months.[311] Indeed, rulemaking projects are sometimes initiated but never brought to conclusion without any formal upper level decision to abandon the effort,[312] and the project returns to the agency's agenda only in response to a new petition.[313] While informal tracking devices may be appropriate for an institution with a limited number of responsibilities that are of limited societal importance, it is entirely inappropriate for a modern federal agency of OSHA's status.

The consequences of OSHA's failure to develop a deadline-setting and action-tracking system are painfully evident. As the agency misses its internally generated deadlines, external pressure grows. At the extreme, an affected group files a bureaucracy-forcing lawsuit and attempts to persuade a court to order deadlines. OSHA has become so accustomed to these suits that it now routinely responds to them by filing a proposed agenda for completing the action, rather than defending its failure to proceed expeditiously.[314] Some cynical OSHA staffers are convinced that the only way that the institution will move forward with a rulemaking initiative in the current context is pursuant to court-ordered deadlines where there is a credible threat that failure to meet a deadline will result in imprisonment. This lesson is not lost on beneficiary groups, and they are increasingly resorting to judicial remedies for OSHA's inaction. The net result is that, to a disturbing degree, OSHA has lost control over its resources.

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[310] Jacoby Interview, supra note 195.

[311] Washington Post, May 12, 1983, A21 col. 2 (relating how the grain elevator standard became "mired in a bureaucratic netherworld between offices" so that no one in the agency could physically locate the rule).

[312] Sevin Interview, supra note 133.

[313] Stein Interview, supra note 123 (citing wood dust as an example); Sevin Interview, supra note 133 (citing cadmium as an example).

[314] Sampson Interview, supra note 134.

If OSHA is to regain control over its own limited rulemaking resources, it must establish a system for establishing and monitoring progress toward the attainment of realistic deadlines for its rulemaking initiatives.[315] It is critical that these deadlines be attainable and not pie-in-the-sky projections. Rulemaking in OSHA is very complex, and it requires agency staff to assimilate file drawers full of highly technical information.[316] The deadlines must be established in full recognition of this fact. Yet once realistic deadlines are established, they should not be easily avoided.

Since rulemaking initiatives are invariably prolonged affairs, the system should be capable of setting and tracking major deadlines for such events as the Assistant Administrator's approval of rulemaking projects, the decision whether to continue with the rulemaking effort after the staff has reacted to responses to any Advance Notice of Proposed Rulemaking, referral of initial decisions to OMB, OMB's response to OSHA's initial decisions, publication of the Notice of Proposed Rulemaking, the beginning and completion of the hearings, and the Notice of Final Rulemaking. It should also be capable of establishing and tracking interim deadlines for less visible milestones such as the time that all involved offices must assign a staff member to the project, preparation of the required departmental documents, preparation of the first draft of the NPRM, responses from various offices (including the Office of the Solicitor) on the first draft, completion of the second draft and responses, and completion of review by the Assistant Secretary's Office and the Policy Review Board.

2. EPA's Action Tracking System.

The Environmental Protection Agency has established an "Action Tracking System" (ATS) that could serve as a useful model for a similar system of establishing and tracking deadlines in OSHA. The ATS is a computerized accountability system that tracks more than 200 items, approximately two-thirds of which are rulemaking actions, as they progress toward completion.[317] It is managed by the Planning and Accountability Branch of the Office of Standards and Regulations, which is under the Assistant Administrator for Policy, Planning and Evaluation.[318] Its purpose is "to provide information on the status of the Agency's important activities in such a way as to ensure that . . . work is flowing smoothly and being completed in a timely way."[319] The system was meant to "highlight delays caused by staff offices--and even the 12th floor [the Administrator's office]."[320]

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[315] This is not the first time that OSHA has been urged to establish a system for establishing and monitoring progress toward deadlines. See Delays in Setting Standards, supra note 49, at 25.

[316] Harwood Interview, supra note 138; Jacoby Interview, supra note 195.

A program office in the agency begins the rulemaking process by preparing a "start action request." This request is forwarded to the Office of Standards and Regulations under the Assistant Administrator for Policy, Planning and Evaluation. This Office has responsibility for moving an action through the agency's complicated rulemaking management system. When the start action request is approved, the activity is placed in the Action Tracking System.

The Planning and Accountability Branch has, in conjunction with the program offices in the agency, established 13 standardized "major milestones" for most rulemaking, based on the agency's past experience with similar rules.[321] Unless the program office convincingly demonstrates why a particular rule is unique in its time requirements, the Planning and Accountability Branch will place its standardized time intervals into the system for major milestones. The program officers are strongly encouraged to place additional subsidiary milestones into the system as well. Subsidiary milestones can alert management when initiatives are falling behind schedule at an early time, and they can make it much easier to point the finger at the responsible person when a major milestone is missed. But unless the Deputy Administrator of the agency requires subsidiary milestones, they are at the discretion of the program office.

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[317] Telephone Interview with Dan Fiorino, Director, Regulations and Information Management Division, Office of Standards and Regulations, OPPE, EPA (November 3, 1986).

[318] Telephone Interview with Robert Curry, Branch Chief, Planning and Accountability Branch, Office of Standards and Regulations, EPA (November 20, 1986).

[319] Memorandum from Alvin L. Alm to Addressees on Action Tracking System, Sept. 20, 1983 at 1 [hereinafter cited as Alm Action Tracking Memo].

[320] Id.

[321] Alm Action Tracking Memo, supra note 319, at 2.

Although computerized status reports are available to anyone with access to the agency's computer, the computer on a biweekly basis pulls out all of the projects for which there are milestones within the next two weeks and all the projects that are behind schedule. This "do-or-late" list is made available to upper level management and mid-level management on a biweekly basis. More importantly, it forms the basis for a report by the Office of Planning and Accountability to the Deputy Administrator for his biweekly meetings with all of the Deputy Assistant Administrators (middle management).[322] The Deputy Administrator carefully peruses the biweekly memorandum, which also contains suggested questions to ask specific middle management officials concerning any failures of their offices to meet their deadlines. Whether or not the Deputy Administrator inquires about a particular project on the late list, the Deputy Assistant Administrator (DAA) responsible for that project must be prepared to explain the missed deadline at the biweekly meeting. Since all relevant Deputy Assistant Administrators are present or represented at these biweekly meetings, they also give one DAA the opportunity to point the finger at another DAA if an office under the second DAA is holding up the rule. The second DAA must also be prepared to explain the problem. The biweekly meeting, then, is a place where middle level and top management can discover bottlenecks and work to eliminate them.

If an office has a good reason for moving a milestone forward in time, it may request the Office of Planning and Accountability to amend the schedule accordingly. This has the effect of postponing the time that the next step of the project "pops up" on the due-or-late list. The requesting office must, however, explain the requested slippage and that explanation itself is entered into the Action Tracking System. The original schedule and all amended schedules, together with the slippage explanations, are retained in the system and may be called out of the computer at any time. The entire history of the project is thus available for inspection.

The analysts in the Office of Planning and Accountability are reluctant to allow amendments to the schedules, and they demand a good reason (usually external to the responsible office) before they will do so. Reasons that suggest internal management or coordination problems are generally insufficient, because those are precisely the situations that should be brought to the attention of the Deputy Administrator and the other DAAs in the biweekly meetings. If the program office insists upon amending the schedule, the matter can be elevated to the Deputy Administrator. Since the Director of the Office of Planning and Accountability acquires over time a good sense for what the Deputy Administrator regards as an acceptable excuse, however, the Director usually prevails.

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[322] Alm Action Tracking Memo, supra note 319, at 2.

During the past year, EPA has initiated an "open season" in September of each year during which program offices are required to identify additional policy guidance and regulatory activities for addition to the Action Tracking System and to update existing schedules to reflect realistic time frames for attaining remaining milestones.[323] Any revisions to existing schedules made during "open season" must be explained. The purpose of the "open season" is to allow each program office to begin the new fiscal year with a clean slate. This is intended to facilitate yearly performance evaluations and budget reviews.

3. Advantages and Disadvantages of an Action Tracking System.

There is little doubt that the Action Tracking System in EPA has greatly enhanced accountability for rulemaking. Low- and mid-level rule managers in all of the program offices report that the Action Tracking System makes them very aware of deadlines and of the possibility that they will be missed. It is at the very least embarrassing for a Deputy Assistant Administrator to have to explain to the Deputy Administrator why a rule from his or her office is no longer on track. Even when the office has a legitimate excuse for delaying a rulemaking effort, it must still go to the trouble of convincing the Office of Planning and Accountability that delay is necessary, and this at least brings the matter to the attention of the appropriate DAA. In general, the Action Tracking System has made the agency much more deadline conscious.[324]

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[323] Memorandum from A. James Barnes to Addressees on Action Tracking System "Open Season," dated August 21, 1986.

[324] The fact that EPA's record in meeting its own statutory and internal deadlines is far from exemplary might suggest that OSHA's implementation of a similar Action Tracking System will not appreciably improve OSHA's rulemaking management process. The most persuasive answer to this objection is that EPA's system has been in place far less than two years. Prior to implementing the Action Tracking System, EPA's rulemaking management process was very similar to OSHA's informal process, and the agency's performance reflected that. Although the

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A similar Action Tracking System in OSHA could go a long way toward improving the rule generating process at that agency, if it were effectively implemented. Rules could no longer disappear into the bowels of the agency, never to be seen again. All approved rulemaking initiatives would be in the tracking system. The fact that the Assistant Secretary (or perhaps a Deputy Assistant Secretary) would be apprised on a continuing basis of deadline slippages should serve as some inducement to the lower level staff, even if it does not provide quite the same spur to action as the threat of going to jail for contempt of court.

A second great advantage of the Action Tracking System is its potential for uncovering bottlenecks. One EPA manager pointed out that when the system picked up delays in several regional implementation programs, further examination revealed that every one of the delays was attributable to the failure of one office in Headquarters to promulgate necessary guidance documents.[325] The agency had been wasting large amounts of money and losing time because of a single bottleneck that was quickly uncovered by the system.

A third advantage of an Action Tracking System is its capacity to identify programs that need more resources. A primary reason for OSHA's delays is the fact that most of the professionals in the Health Standards Directorate are constantly juggling several rulemaking actions at any given time.[326] When there are no deadlines, any individual staff member can always put off one project to work on another, and it is difficult for a staffer to tell his or her boss that he or she is too busy if there is no time limit for any given job. Thus, the absence of deadlines and a tracking system can give the false impression that OSHA is capable of doing more than it

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[324] Action Tracking System has not been in place long enough to yield quantifiable results, EPA's upper- and mid-management strongly believe that it has improved the rulemaking management process. EPA's ability to stay reasonably well on track in promulgating implementing regulations for the 1984 amendments to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., indicate that the process may be working in fact as well as in theory.

[325] Telephone Interview with Cynthia Puskar, Office of Management Systems and Evaluation, OPPE, EPA (November 18, 1986).

[326] Harwood Interview, supra note 138; Stein Interview, supra note 123.

really can with its limited resources. Rather than disappoint a beneficiary group by declining to take on its preferred project, OSHA can simply agree to undertake it without saying when it will get done. In the long run, however, this tactic leads to the agency's disappointing many beneficiary groups when very little ultimately gets accomplished. And the focus at that point is inappropriately on the presumed lethargy of OSHA bureaucrats rather than on OSHA's lack of adequate resources.

Reasonable deadlines and an action tracking system can reveal resource conflicts at a very early stage as one project officer explains that the reason that he or she missed a deadline was because he or she was working on another high priority project. Upper level decisionmakers can quickly become aware of the fact that the agency has filled its plate too full, and it can attempt to limit the number of new initiatives that it undertakes. In addition, the Action Tracking System can reveal individual branches within the agency that need more resources. If a single office is consistently behind the standardized deadlines, the problem may be that the program is lethargic, but it may be that the program needs more resources. Rather than firing the responsible official, the solution may be a quick infusion of resources into the troubled program.[327]

The Action Tracking System is not, however, without its disadvantages. Perhaps the most significant disadvantage is that its heavy emphasis on meeting production deadlines may sacrifice quality. In the agency vernacular, the "bean counting" approach may result in rules that are not well considered and that are not well supported by facts and analysis. If the agency places too much emphasis on quantity and not enough on quality, it may produce a plethora of rules that are later remanded to the agency by the reviewing courts for reconsideration.

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[327] For example, the Solicitor's Office complains that the reason that it is very often a bottleneck is its lack of resources. Jacoby Interview, supra note 195; Gordon Interview, supra note 129; Henshel Interview, supra note 123. Even if OSHA's priorities were definitely set and clearly communicated to the Solicitor's Office, it would still be a bottleneck, because it is incapable of reviewing as many rules as OSHA is capable of producing. OSHA officials respond that the Solicitor's Office could review more rules with the same staff if it were less concerned with nitpicking details. Whatever the merits of this debate, an Action Tracking System would force the disagreement to the attention of upper level decisionmakers who could either provide greater resources to the Solicitor's Office or tell it to be less thorough in its reviews of OSHA documents.

A second disadvantage of the system is that it will require additional staff. Before OSHA could effectively implement a similar system, it would have to make the resource commitment to staff an office with the exclusive responsibility for managing the tracking system. For a small agency such as OSHA, the staff could be small, perhaps as small as one or two employees.[328] The staff would have to interract closely with the high level manager (either the Assistant Secretary or one of his Deputies) who is positioned at the top of the system, so that it could become very familiar with the reasons for deadline slippage that were acceptable and those that were not. To avoid requiring the ultimate decisionmaker to determine the merits of deadline slippages on an individual basis, the staff would have to be delegated some de facto authority to reject proposed deadline extensions. If the deadlines could be extended without penalty, they would not really be binding.

A third related disadvantage is that a well-run action tracking system is quite demanding of high level officials. Since the time of high level agency officials is always in short supply, this added responsibility to meet with mid-level management on a biweekly (or some similarly short interval) basis can be quite burdensome. Nevertheless, this high degree of upper level attention is absolutely critical to the successful operation of the system. A system that informs lower level officials of their failures is of little value, if there is no potential for embarrassment before a high agency authority. EPA's last two Administrators have found the Action Tracking System to be sufficiently useful to warrant biweekly meetings with the agency's second in command, and there are no indications of dissatisfaction with this use of high level management resources.

A fourth disadvantage is that the information in the action tracking system can become public through discovery in a bureaucracy-forcing lawsuit, a separate suit under the Freedom of Information Act, Congressional investigation, or the omnipresent "leak." The agency can safely assume that its own evidence of its inability to keep rules running on schedule will be subject to public attention. This can be of serious tactical disadvantage to the agency in a bureaucracy forcing suit, and it can put the agency in an embarrassing position in its relationships with committees in Congress. It is always more comfortable for the agency to say: "We are doing the best that we can," without having to worry about the possibility that its action tracking system will undermine its statements.

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[328] By way of comparison, OSHA has a total of about 2300 employees, while EPA employs more than 9000.

In the final analysis, however, the advantages of the action tracking system far outweigh its disadvantages. Quality need not be sacrificed for "bean counting," if the agency is conscious of the problem, plans its resource needs in advance, matches those needs to realistic projections of resource availability, and allows deadline slippage for genuine quality concerns. Because the system would rely heavily upon computers, its personnel demands would be slight, and the simplicity of the program suggests that the computer resource needs would not be large. Revealing slippage to the world may be embarrassing, but it also renders the agency accountable to the public.

The largest hurdle in the way of implementing an effective action tracking system is the degree of upper level commitment required to make the system work. It necessarily demands a large degree of very high level management attention. Unless either the Assistant Secretary or one of his Deputy Assistant Secretaries is willing to devote at least one-half day every two weeks (and perhaps more time in some intense periods), the system will fail. Moreover, upper level management will have to demonstrate its commitment to an effective rulemaking management system by tying the agency's incentive structure to that system.

> RECOMMENDATION: OSHA should immediately establish an Action Tracking System, modeled on the system in effect at the Environmental Protection Agency, to document the progress of rulemaking initiatives. The system should contain deadlines for meeting standardized major milestones and additional intermediate minor milestones in the progress of a rule's development. The Assistant Secretary or one of the Deputy Assistant Secretaries should meet on a biweekly basis with the Directors and Deputy Directors of the OSHA Directorates, the Deputy Assistant Solicitors for OSHA Health and Safety Standards, and perhaps a representative from the Departmental Policy Office to discuss progress toward designated milestones and reasons for any missed deadlines. OSHA should appoint a staff of one or two employees, which might be lodged in the Policy Office to manage the Action Tracking System.

C. Inadequate Incentives.

A rule management system cannot be effective if there are not adequate incentives for staff to proceed ahead with rulemaking initiatives in a timely fashion. While some agency staffers feel a keen sense of embarrassment that rulemaking efforts take so long, many have grown quite cynical about the desire of upper level management to use government regulation as a vehicle for improving health and safety in the workplace. There is a general sense among agency staff, many of whom are past the mid-point of their careers, that agency management does not reward production and does not penalize lethargy.[329] Several agency employees noted the recent apparent inability of the agency to attract and retain young and energetic professionals to the agency's standard-setting activities.[330]

From management's perspective, it is apparent that it has very few tools available for providing incentives. The agency has only a very limited budget available for cash awards and merit bonuses. Penalties for nonproduction are very difficult to administer. The ultimate threat of termination is laughably unrealistic. Civil service laws and due process requirements ensure that firing a protected professional is an arduous process that is only very rarely worth the considerable institutional energy that it absorbs. Even if the agency were to take this drastic step for a single nonproductive employee (perhaps to set an example for others), there is a real possibility that externally imposed hiring restrictions would preclude hiring a replacement. A lazy employee may be better than no employee at all. Even the more realistic threat of sending an employee to "Siberia" deprives the agency of his or her services.

Although there are not easy solutions to the incentives problem, some things can be done on a practical level and much can be done on a symbolic level. Assistant Secretary Pendergrass' job resembles, to a somewhat lesser degree, the task that former Administrator William Ruckelshaus faced when he returned to EPA in 1983. Ruckelshaus returned to an agency stripped of resources, extremely low in staff morale and very low in productivity. He brought a very effective manager with him to be his Deputy Administrator, and he proceeded directly to the largely symbolic task of bolstering staff morale and projecting a better public image of the agency. The effective management of Deputy Administrator Alm, who established the Action Tracking System described earlier, was crucial. He used the meager incentive tools available to him very effectively to reward expeditious work and to punish lack of productivity. But more importantly, Administrator Ruckelshaus, in both his internal and external statements, created a sense among agency staff that the job they were doing was important and that doing it well was a reward in-and-of-itself.

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[329] See also Railton Interview, supra note 188 (OSHA suffers from morale problems and needs leadership).

[330] While this observation is no doubt accurate, attributing the relative absence of young professionals on OSHA's standard-setting staff to inadequate incentives may be unfair. In the past six years of drastically declining budgets, OSHA has had few positions to fill. Hence, the lack of vitality may be more attributable to lack of resources than to lack of management incentives. Nevertheless, the inability of upper level management to secure new positions or even to stem the loss of existing positions has not gone unobserved by agency staffers as evidence of the poor incentives within the agency.

Given the large salary differentials between the public and private sectors, a sense of mission may be the most significant tool that OSHA has to attract and retain energetic professional staff. Assistant Secretary Pendergrass might likewise reinvigorate OSHA's professional staff by sending internal and external messages that the agency's mission is important and that public service is not second class citizenship.

While symbols are important, they will probably not be sufficient to reinvigorate an agency as heavy laden with cynicism as OSHA. Symbols are fragile--if they are not backed up with resources, they will appear hypocritical and quickly be ignored. The agency must develop other rewards for expeditious progress and penalties for missed deadlines. The Action Tracking System described earlier has built-in incentives. Avoiding embarrassment is usually a large incentive for professionals in bureaucracies. When effectively administered, the Action Tracking System will make high level management aware of missed deadlines and require responsible mid-level management officials to explain delays in a meeting before their peers. In EPA, the threat of such an embarrassing encounter has acted as a significant spur to get promised tasks performed on time.

Upper- and mid-level management should also have financial incentives available to reward good work. To a large extent, financial rewards should depend upon the quality of professional work, rather than its speed. But they should also be tied to performance as measured by the Action Tracking System. Nonfinancial rewards, like the "silver medals" that the Administrator of EPA personally awards in a public ceremony to outstanding agency employees, could be awarded to personnel on projects that are highly successful in meeting deadlines. Finally, upper level management can make it clear to mid-level management and staff professionals that annual leave will be cancelled for persons working on projects that are not on track.

> RECOMMENDATION: Upper level management in OSHA should attempt to convey to OSHA professionals the message that OSHA's task is an important one that requires commitment

to the expeditious implementation of the agency's statutory mandate. OSHA management should reinforce such symbolic messages with real rewards for expeditious work and penalties for unwarranted delays.

D. Coordination Among Institutional Actors.

Developing a rule requires the input of several institutional entities within OSHA and within the Department of Labor. While the project officers in the Health and Safety Directorates do the bulk of the work of gathering background information, administering contracts for technical information, assembling the record, drafting the proposed and final rules and mining the outside comments for information and analysis, they must depend upon at least two other offices in every rulemaking effort. The Policy Office in OSHA is responsible for gathering information on the costs and economic and technological feasibility of complying with proposed rules. The Solicitor's Office, which is not part of OSHA, must review documents to be published in the federal register, draft certain parts of those documents, and prepare expert witnesses for testimony at the hearings.[331]

Since the project officer has no direct control over either of these offices, he or she must either induce the representatives from these offices to do their jobs in an expeditious fashion or do their jobs for them. How the project officer proceeds is largely a matter of personal style. Most of the project officers interviewed for this Report simply did the jobs themselves if the representatives from the other offices did not perform their tasks in a timely fashion.[332] At least one project officer sets firm deadlines and threatens to send the document forward without the needed work from other offices if it is lacking, seeking thereby to use the threat of embarrassment to induce the representatives from the other offices to meet the deadlines.[333]

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[331] In addition, before OSHA rules may be cleared at the Departmental level, the Assistant Secretary for Policy must be satisfied that the rules conform with overall Departmental policies. Like the Solicitor's Office, OSHA has no control over this office. F. White Interview, supra note 59.

[332] Stein Interview, supra note 123; Silk Interview, supra note 224; Harwood Interview, supra note 138; Gordon Interview, supra note 129.

[333] Sevin Interview, supra note 133.

Clearly, neither of these solutions is adequate. Project officers are trained in health and safety matters; they are not competent to draft the economic and legal sections of documents to be published in the Federal Register. Although the threat of moving ahead without the work of the other offices may act as some inducement to action, it is ultimately a hollow one. As a practical matter, the agency cannot publish a document that lacks the relevant sections. Even the threat of embarrassment may not be real to an attorney in the Solicitor's Office, who does not report to any upper level OSHA official.[334]

Another alternative is for the project officer to elevate matters to mid-level management. The Director of the Health or Safety Directorate may informally bring delays to the attention of the Director of the Policy Directorate or the Assistant Solicitor for OSHA.[335] But even at this level, there is no guarantee that the priorities of both offices are identical. In the past there have been problems of coordinating priorities.[336] The Policy Office, which has even fewer professionals than the Health and Safety Standards Directorates, must know the relative priorities of those Directorates so that it can adequately manage multi-year contracts and draft documents in the proper sequence.[337] In the past, poor communication of priorities between the two offices has resulted in significant bottlenecks in the Policy Office as completed technical analyses on health issues awaited the completion of analyses of the feasibility of control technologies.[338]

Similar coordination problems have afflicted the relationship between the Health and Safety Standards

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[334] To the extent that there is pressure from the OSHA project officer's superiors to move a rulemaking initiative along expeditiously, a staff member from one of the other offices can use delay as a lever to extract substantive concessions on the content of rules. Thus, the absence of a mechanism for making individual offices accountable for delays can result in a changed substantive output.

[335] Stein Interview, supra note 123; Henshel Interview, supra note 127.

[336] Martonik Interview, supra note 59.

[337] Braslow Interview, supra note 123.

[338] Stein Interview, supra note 123; Silk Interview, supra note 224.

Directorates and the Office of the Solicitor.[339] Like the Policy Office, the Solicitor's Office sometimes lacks sufficient resources to stay abreast of all of the rulemaking activities of the Health and Safety Directorates.[340] According to one OSHA project officer, "any given project officer is fighting with other project officers for the time of the economists and lawyers."[341] If an item has a higher priority in OSHA than it does in the Solicitor's Office, the Solicitor's Office priority necessarily prevails.[342] In addition, since middle management in the Solicitor's Office usually insists on reviewing the documents that the attorneys have produced or reviewed, documents tend to pile up on the desks of mid-level managers in the Solicitor's Office.[343] OSHA project officers and mid-level managers are frequently frustrated by these bottlenecks.

Officials in the Solicitor's Office counter that they have an important quality control function.[344] They must insist that preambles to proposed and final rules are written with sufficient clarity, analysis and record support that they can survive the inevitable judicial challenges.[345] Too often, in the opinion of some in the Solicitor's Office, the project officers in OSHA believe that it does not matter what is in the document as long as it comes out on time.[346] In addition, the attorneys have a substantive role to play in ensuring that OSHA standards are enforceable, a consideration that OSHA sometimes neglects.[347] They maintain that performing these quality control functions is time consuming and cannot be started until OSHA has produced a near-complete document.[348] Finally, the Solicitor's Office is plagued with a high turnover rate. Each time an attorney leaves, a new one must familiarize himself with the details of several projects.[349]

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[339] Stein Interview, supra note 123.

[340] Jacoby Interview, supra note 195; Henshel Interview, supra note 127.

[341] Harwood Interview, supra note 138.

[342] Silk Interview, supra note 224; Harwood Interview, supra note 138; B. White Interview, supra note 59; Martonik Interview, supra note 59.

[343] Silk Interview, supra note 224; B. White Interview, supra note 59; Officials in the Solicitor's Office do not deny this. Jacoby interview, supra note 195; Henshel Interview, supra note 127.

[344] Jacoby Interview, supra note 195; Gordon Interview, supra note 129; Henshel Interview, supra note 127.

[345] Jacoby Interview, supra note 195.

[346] Jacoby Interview, supra note 195.

The problem of delays and bottlenecks is largely a problem of coordination.[350] In principle, the Policy Office and the Solicitor's Office are willing to adhere to the priorities of the Health and Safety Standards Directorates.[351] Problems arise when those priorities and (perhaps more frequently) changes in such priorities are not communicated to the other offices. And to the extent that the Policy and Solicitor's Offices have different priorities and are unwilling to amend them to reflect the priorities of the Health and Safety Standards Directorates, high level intervention becomes necessary.

The Directors of the Health and Safety Standards Directorates have traditionally attempted to coordinate informally with their counterparts in the other Offices, but this has not generally proved satisfactory. First, the need for coordination under such an ad hoc process all too often becomes apparent after problems have already arisen. Sometimes correcting the problem is not an easy matter; for example, the Health Standards Directorate may need today the results of a contractor's study that, under the terms of the contract, will not be ready for another six months.[352] Second, the ad hoc

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[347] Jacoby Interview, supra note 195; Henshel Interview, supra note 127.

[348] Jacoby Interview, supra note 195; Henshel Interview, supra note 127.

[349] Henshel Interview, supra note 127.

[350] F. White Interview, supra note 59.

[351] Frodyma Interview, supra note 66; Jacoby Interview, supra note 195. The Solicitor's Office has a legitimate coordination problem, because its time is not necessarily its own. Litigation schedules are not always predictable, and an attorney who is critical to a rulemaking project may be called away for weeks writing a

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[352] One observer related a case in which lack of communication resulted in a regulatory impact analysis

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approach deals with only the worst problems--i.e., those that are of sufficient magnitude that the project officer brings them to the attention of the Director.[353] Third, the informal approach will not resolve genuine differences in priorities when the two offices are in disagreement as to what the priorities should be. Finally, the informal approach will not prevent other offices from using delay to advance particular substantive agendas. For these reasons, a more formalized procedure is needed to force coordination among the relevant institutional actors and to obtain upper level resolution of differences on a regularized basis.

The Action Tracking System described previously is an ideal vehicle for this purpose. With such a system in place, the Health or Safety Standards Directorate would enter a proposed schedule into the system at the time the project was approved by upper level management. The other relevant offices would have an opportunity to comment upon the proposed schedule before it became final. Any disputes over the proposed schedule could be resolved in one of the periodic meetings with the Assistant Secretary or Deputy Assistant Secretary and mid-level managers, thus avoiding future bottlenecks. As a deadline approached, the relevant offices would receive reminders from the system operators. If a deadline was missed, the responsible offices would be obliged to explain the slippage at one of the meetings. The location of the bottleneck or delaying activity would become immediately apparent, and additional resource needs could be identified. Conflicts in priorities would also be revealed to upper level management who would then be in a position to resolve such conflicts on-the-spot.[354]

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[351] brief to support a previous standard. Henshel Interview, supra note 127. But this is not a major cause of missed deadlines in the Solicitor's Office.

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[352] (based on contractor studies) that analyzed options that were not in the draft premable or the proposed rule. The process was delayed for almost a year while the contractor studied the options that were in the preamble and the regulatory impact analysis was revised to fit the preamble. Seminario Interview, supra note 131.

[353] Henshel Interview, supra note 127.

[354] Conflicts between OSHA priorities and the priorities of the Solicitor's Office would be less easily resolved,

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In addition, the team concept can help avoid schedule conflicts at lower levels in the agency. At the most basic level of interaction between the essential institutional actors--the informal rulemaking teams that exist in practice, if not on paper--there is in fact a good deal of coordination. Many, though by no means all, project officers in the Health Standards Directorate expressed satisfaction with the ability and diligence of their counterparts from the Office of Regulatory Analysis and the Solicitor's Office.[355]

At the time the Assistant Secretary decided initially to pursue a rulemaking initiative, the Health & Safety Directorate, the Policy Directorate, and the Solicitor's Office could formally assign a representative to a team chaired by the Health and Safety Directorate. Representatives from other parts of the agency, such as field operations, could be assigned to teams on an ad hoc basis. The timing of input from the Policy and Solicitor's offices should not be a matter within the discretion of the project officer in the Health and Safety Directorate, as it commonly is at present. The Action Tracking System could, for example, have a standardized deadline for the first team meeting to ensure that all of the relevant offices assigned members to the team in a timely fashion and to ensure input from the other offices before the project officer has foreclosed possible regulatory options.

The agency has, however, experienced problems with the team concept that may arise again if it is reinstituted. First, the team leader does not have line authority over other members of the team.[356] This, however, is not so much a problem with the team approach itself as it is a problem of lack of accountability in the various offices that provide representatives to the teams. Adoption of an Action Tracking System should go a long way toward eliminating this problem. Even if a project officer does not have authority to enfoce deadlines, the Action Tracking System will make it clear to high level officials who is missing deadlines.

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[354] because the Solicitor's Office does not serve OSHA. But they would be made apparent at a very high level within OSHA, and could be resolved in meetings between the Deputy Assistant Secretary for OSHA and the Assistant Solicitor for OSHA.

[355] Silk Interview, supra note 224; Harwood Interview, supra note 138.

[356] Frodyma Interview, supra note 66; Silk Interview, supra note 224.

A second problem with the team approach is the possibility of "renegade teams." According to some observers at OSHA, a primary reason for eliminating the team approach in 1985 was the fear that teams would form their own opinions on issues and inform the press when those opinions differed from those of agency policymakers.[357] The "renegade team" problem is particularly a problem of middle management. If the Directors of the Directorates are incapable of preventing professional staff from advancing their own agendas through the press, the Directors are not doing an adequate job of managing. While this may be a problem during a time of weak management and very low agency morale, the fear that lower level staff will gang up on upper level decisionmakers is not a good reason to abandon a vital decisionmaking tool.

When a team that works well together is established, there may be no good reason to break it up. To the contrary, there is every reason to keep a successful group together to work on other projects.[358] Although OSHA has made no effort in the past to keep successful teams together, it should consider doing so in the future. Cooperation at the informal work group level can eliminate much friction at higher levels.

> RECOMMENDATION: OSHA should formally reinstate the team concept to perform the basic tasks of gathering or analyzing information, drafting documents, responding to comments and advising the Assistant Secretary. OSHA should attempt to coordinate rulemaking initiatives through the Action Tracking System previously recommended. OSHA should consider allowing successfully functioning teams to work on more than a single rulemaking initiative.

E. Lack of Policy Interchange.

OSHA lacks a procedure for communicating policy from upper level management to lower level professionals. Typically, once a rule is assigned to a project officer, he or she is allowed to develop the rule, with the help of other employees drawn from OSHA and the Solicitor's Office, without much upper level supervision until he or she has produced a draft of a notice of proposed rulemaking. While this maximizes the freedom of lower level staff to incorporate technical data and scientific and engineering judgments into the final rulemaking product, it minimizes upper level policy input. Since policy plays a very large role in scientific rulemaking,[359] the product that ultimately emerges may not satisfy upper level management from a policy perspective. Similarly, purely technical considerations may cause lower level staff to eliminate alternatives that might be attractive from a policy perspective, thereby depriving upper level management of an opportunity to chose from among a full range of options. Too often, upper level management receives a memorandum that sandwiches the staff's preferred alternative between two red herrings, leaving the agency policymakers with no real choice.

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[357] Frodyma Interview, supra note 66; Seminario Interview, supra note 131; Silk Interview, supra note 224; F. White Interview, supra note 59; B. White Interview, supra note 59; Braslow Interview, supra note 123.

[358] Gordon Interview, supra note 129.

This hierarchical approach to developing a proposed rule has a vast potential for unnecessary delay. If the upper level managers are dissatisfied with the staff's output, they may either send the staff back to the drawing board, perhaps to return only after further information has been gathered and options developed over a period of months or years, or return the project to the staff for time-consuming patch and repair.

When upper level policymakers return projects to agency staff, they rarely provide written documentation of the reasons for the action.[360] Decisions may be made in meetings in which the pros and cons of various options are debated, but such meetings do not result in closure memoranda memorializing the issues discussed and the reasons that motivated policymakers. When a similar issue arises in the future at lower levels, one or more staffers or an Office Director might recall the previous meeting in which upper level decisionmakers took a position on the issue, but even when this sort of internal folklore is available to low level staffers it may be inaccurate or out of date. In the absence of written accounts of important decisionmaking meetings, agency staffers are obliged to decide many issues anew in individual proceedings. On some large issues, such as the policy preference for engineering controls over personal protective devices, the position is reasonably clear and consistent, but on other important issues, such as the weight to be afforded disease end-points other than cancer, low level staff are often at a loss.[361]

Lack of policy communication can also produce "renegade teams" attempting to implement policy agendas that vary from those of upper level management. As previously noted, the "renegade team" problem was one of the reasons that the team concept for rulemaking was abandoned.[362] Eliminating the team approach, however, does not necessarily prevent staff members from attempting to implement their own policy agendas through the normal rule development process. Although most members of the professional staff agree that major policy decisions should not be made at the GS-13 level, they express frustration at the failure of upper level policymakers to communicate policy to lower level staff.

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[359] See McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L.J. 729 (1979).

[360] Sevin Interview, supra note 133.

[361] Sevin Interview, supra note 133.

OSHA could reduce this large potential for duplicative and time-consuming remands to the staff by establishing a process for elevating issues from the staff level to very high levels in the agency at periodic intervals and when otherwise needed to resolve intra-agency policy clashes. EPA has established a process that may serve as a model for OSHA. Under EPA's procedure, high level personnel in the program office may nominate important rules for a special "Options Review Process."[363] The Deputy Administrator of the agency then designates 20-30 rules per year for this special review process.

At crucial junctures in the evolution of a rule, an Options Review Meeting is held to choose which regulatory options the agency will actively pursue throughout the remainder of the rulemaking process. The participants in the Options Review Meetings are the Deputy Administrator and other very high level agency employees representing offices with an interest in the proceeding. The timing of the Options Review Meeting is flexible. It is intended to occur after the team has devoted some study to the relevant issues but before it has narrowed down the options to the two or three to which it will devote the bulk of its attention. The lead office prepares an analysis of several options, and the goal of the meeting is to narrow the range of options.[364]

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[362] Silk Interview, supra note 224; F. White Interview, supra note 59; B. White Interview, supra note 59; Frodyma, supra note 66.

[363] Nominations for review are based upon rule's anticipated cost, the likelihood that it will cause public controversy, its importance to the program, its precedential value, and the probability that the rule will require the agency to resolve a major policy issue that may have impacts on more than a single program.

[364] Memorandum on Options Selection/ Rejection Process from Alvin L. Alm, Deputy Administrator to Assistant

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The purpose of the Options Review process is five-fold. First, upper level decisionmakers view the Options Review process as "an institutional mechanism for forcing consideration of a much broader spectrum of approaches to the regulatory problem."[365] Having forced lower level staff to identify a broad range of options, a second purpose of the process is to allow high level policymakers to narrow the range of options that the lower level staff considers and, as the rulemaking process progresses toward completion, to select the option that will go forward to OMB and the Administrator as the agency's preferred option.[366] Third, the process was intended to give upper level management a greater role in the subtle policymaking that goes on at low levels in the bureaucracy as the staff attempts to reach consensus. Finally, it was intended to reduce the number of occasions in which upper level decision makers in reality had only the two options--accepting the staff recommendation or sending everyone back to "square one."

Upper level managers in EPA have generally been very satisfied with the Options Review Process. There is a general perception at all levels in the agency that the process has been extremely useful in providing policy direction to lower level staff. While this is obviously attractive to very high level management, low level staff also like the potential that the process has for forcing high level resolution of difficult policy issues. The Options Review Process also provides an effective vehicle for resolving low level disputes. By giving the disputants a "day in court" before the highest level agency decisionmaker early in the process while many options are still alive, it interjects a "creative" adversarial note into the agency deliberations. The Deputy Administrator often decides issues in the presence of the staff, and not later after an opportunity for "insider" lobbying.[367]

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[364] Administrators and General Counsel, November 4, 1983 [hereinafter cited as Options Selection/Rejection Memo].

[365] Interview with Rob Wolcott, Special Assistant to the Deputy Administrator, EPA, Washington, D.C. (June 27, 1984).

[366] Memorandum on Criteria and Guidelines for Review of Agency Actions from Alvin L. Alm, Deputy Administrator to Assistant Administrators, General Counsel, Inspector General, Associate Administrators, Regional

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[367] Wolcott Interview, supra note 364.

The chief disadvantage to the Options Review process is that it consumes a great deal of the time of very high level officials. High level policymakers must prepare extensively for options review meetings, which can go on for hours before coming to closure. Second, the process demands that very high level officials narrow options on the basis of a relatively brief debate. If the policymaker is not adequately prepared, this may produce snap judgments that the agency may later regret. Third, it requires upper level decisionmakers to make difficult decisions. Although doing nothing or gathering more data are usually available options, the fact that a decision is required means that the upper level decisionmakers cannot brush difficult rulemaking initiatives under the rug. Finally, closure memoranda for Options Review Meetings can result in differing interpretations of decisions reached in those meetings. On some occasions in EPA, each side to a debate has read the closure memorandum to seal a victory for its point of view.[368]

On balance, however, the options review mechanism can be of great utility to an agency that has difficulty making decisions and communicating policy to lower level staff. The process is highly regarded at all levels in EPA, and it has been retained by the new administration that replaced the Ruckelshaus administration in 1985.

EPA's Options Review process is not the only alternative available for structuring upper level input into lower level decisionmaking at an early stage in the development of regulatory options. In a small agency like OSHA, it may be possible for upper level decisionmakers to participate directly in the lower level decisionmaking process on a routine basis. Early in OSHA's history, relatively high level decisionmakers participated actively in the development of individual rules. But, as we have seen, the tendency then was for the agency to concentrate all of its attention on one or two large rulemaking actions to the exclusion of other activities, such as priority setting. If OSHA is to have a regularized process for initiating rulemaking projects on a continuous basis, and if the agency leadership is to be available for other important tasks, it should probably not return to the more personalized process of the past.

An intermediate approach would be for the Assistant Secretary to pick two or three important rules per year for his

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[366] Administrators, and Staff Office Directors, January 30, 1984 [hereinafter cited as Criteria and Guidelines Memo], at 5.

[368] Wolcott Interview, supra note 364.

special attention. A special high level work group could be appointed with the Assistant Secretary or one of his Deputies as the chair of the workgroup. Agency employees with particular expertise could be called in as needed to provide technical expertise. The Food Safety and Inspection Service in the Department of Agriculture has adopted this model for a few very important and controversial rules.[369]

The primary advantage of this approach is that it allows very high level decisionmakers to become deeply involved in the nitty gritty of a few rulemaking efforts. Those few rules that get an intense dose of high level policy input may serve as precedents for less important rules. The approach also allows upper level policymakers to see the rule-generating process in actual operation, and it may give them a more sympathetic understanding of the problems that lower level work groups face.

This high level work group approach does, however, require a decisionmaker who is not afraid to steep himself in the details of highly complex decisions. Because it requires a rather intense effort by very high level agency decisionmakers, it must be reserved for very important rules. It is better adopted to an agency, like FSIS, that writes no more than a single major rule every year or two. Virtually every rule that OSHA promulgates has large impacts on worker health and the regulated industry, and there is no natural dividing line between rules that are deserving of special treatment and rules that can adequately be handled by the ordinary rule initiation process. Thus, the high level work group approach may not be easily adapted to OSHA.

OSHA should attempt to implement an Options Review Process patterned after the EPA model, but applicable to all of its rules. Although OSHA is a small enough agency that policy coordination among upper level managers is generally not a difficult matter, the critical elements of the Options Review Process are its systematic nature and its penetration to the lowest levels of the agency. Policy need not be communicated on an ad hoc basis in a very general way; it is communicated in regulatory meetings about particular issues that arise in particular projects. Most importantly, precedents are set to guide other staffers working on other projects. Because the precedents are memorialized in closure memoranda that are available for all agency employees to read, the agency can avoid time-consuming future remands and the risk of renegade teams.

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[369] See T. McGarity, Regulatory Analysis in Federal Regulatory Agencies, Report to the Administrative Conference of the U.S. (1985).

> RECOMMENDATION: OSHA should implement an Options Review process for important health and safety rulemaking initiatives. At least once in the early development of such rules the staff should identify and analyze several options for consideration in an Options Review meeting chaired by the Assistant Secretary or one of the Deputy Assistant Secretaries. The goal of Options Review meetings should be to discuss and debate broad alternatives for approaching a rulemaking initiative and to narrow the range of options to be considered in the future. The meeting should be memorialized in a closure memorandum that would be made available to staff involved in other rulemaking initiatives.

OSHA could conceivably fold an Options Review Process into the implementation of an Action Tracking System, should it choose to adopt that system. The key to a successful Action Tracking System is the periodic (biweekly in EPA) meetings of a high level official with mid-level management to report on the status of pending projects. Similarly, the key to the Options Review Process is the meetings of a high level official with upper and mid-level management to narrow options. In a small agency like OSHA, it may be possible to combine these two functions in to a single two-part "Status Review and Options Selection/Rejection" meeting of the Assistant Secretary or one of his Deputies with mid-level management. The first half of the meeting would be devoted to status reports on pending activities. The second half would be devoted to any options selection/rejection items on the agenda. Any of the Directors could place a matter requiring high level policy input on the agenda for the second half of the meeting by preparing and circulating an options memorandum in advance of the meeting. The memorandum would identify the issue, place it in the context of a particular project, explain its broader significance, if any, to other pending or future projects, set out several options for resolving the issue, and briefly identify the advantages and disadvantages of each option. In order to get on the agenda for a meeting, the Office would have to circulate the memorandum sufficiently far in advance that all relevant offices in the agency could prepare responses. Since OSHA must prepare an Options Memorandum for the Departmental Policy Review Board in any event, the time spent preparing options memoranda for agency Options Review meetings would not be wasted. Those memoranda would merely be precursors for the Departmental Options Memorandum.

While any important issue in any project could be placed on the agenda for the section half of the meeting, the Action Tracking System would, in addition, schedule options review meetings at standardized critical junctures in the development of all rules. An options review session would automatically be scheduled at these critical junctures and the Directorate responsible for the rule's development would be required to prepare an options memorandum for circulation and response prior to the meeting or be prepared to explain at the first half of the meeting why no options review is necessary for the project during the second half of the meeting.

While the options review process will not eliminate all of the problems of policy coordination in an agency that must address complex science/policy questions on a regular basis, it can bring about a significant improvement in OSHA's current ad hoc approach at very little expense. The chief ingredients are an effective Action Tracking System, conscientious mid-level managers, and an Assistant Secretary or Deputy Assistant Secretary who is willing to become immersed in important science/policy issues and make tough decisions in an expeditious fashion. The Action Tracking System adds an element of discipline to the otherwise loosely coordinated rule initiation process, and the Options Review approach interjects a crucial element of policy guidance at critical junctures. No systematic decisionmaking approach, however, will enhance OSHA's rule generation process if upper level decisionmakers are not willing to make hard decisions on the basis of very little information in an expeditious fashion, a subject to which now turn.

F. Inability to Make Difficult Decisions.

Virtually all health regulations and many safety regulations require extremely difficult decisions from upper level management in OSHA. Since delay is always in the interest of some interested party, OSHA decisionmakers often face strong pressures not to decide these difficult questions. When placing a "hot" political issue on the back burner is a viable option, upper level decisionmakers may elect that option, rather than stir up further controversy. Decisionmakers may also have technical reasons for not deciding, such as the desire to await the completion of one more study or survey that has the potential to reduce the very large uncertainties surrounding science/policy decisionmaking. Sometimes there is a legitimate need to do further work to avoid the possibility of reversal in the courts of appeals, but sometimes the desire for more information is a convenient excuse not to decide difficult questions.

OSHA has shown an increasing tendency to rely routinely upon Advance Notices of Proposed Rulemaking (ANPRs) to solicit information from regulated industries and other interested parties. The ANPR can be an effective tool for acquiring information and ideas at an early stage in a rule's development.[370] But there is a general feeling among agency staff and among outside practitioners that the ANPR rarely results in the production of useful information for OSHA.[371] Outside parties are simply unwilling to scour their files for information at this stage, and to the extent that information that is not readily available to OSHA is available to outside parties, they are unwilling to tip their hands at this early stage and face the risk of revealing or foreclosing later strategies.[372] Most observers of the process believe that the ANPR at best serves the function of putting companies on notice that the agency is seriously considering promulgating a standard for them; it rarely induces them to share useful information with the agency. Yet agency contractors understandably want to delay their reports until they have had an opportunity to assimilate any information that an ANPR produces.[373] Since it can delay the rulemaking schedule by six months to a year, the ANPR can be used to avoid hard decisions.[374]

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[370] See ACUS Recommendation No. 76-3, 1 C.F.R. § 305.76-3 (1986) (suggesting that ANPRs are effective when: "(1) the scientific, technical or other data relevant to the proposed rule are complex; (2) the problem posed is so open-ended that an agency may profit from receiving diverse public views before publishing a proposed rule for final comment; and (3) the costs that errors in the rule may impose, including health, welfare and environmental losses imposed on the public and pecuniary expenses imposed on the affected industries and consumers of their products, are significant.")

[371] Harwood Interview, supra note 138; Gas Interview, supra note 159.

[372] Harwood Interview, supra note 138.

[373] Gordon Interview, supra note 129.

[374] Stein Interview, supra note 123; Gas Interview, supra note 159. Based on a Report prepared by Professor Luneberg, The Administrative Conference has recommended that "where appropriate and feasible," agencies should publish notice of the receipt of petitions for rulemaking and provide a period of time for public comment. Luneberg, supra note 132; ACUS Recommendation No. 86-___, 1 C.F.R. §305.86-___ (1986). We agree that it is generally a sound practice for an agency to inform the public of a rulemaking petition and to allow public

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> RECOMMENDATION: OSHA should not routinely use the Advance Notice of Proposed Rulemaking (ANPR) as an information gathering technique. The ANPR should only be used when information that is not available through other vehicles is very likely to be forthcoming in response to the ANPR.

Some agency staffers and most representatives of beneficiary groups believe that OSHA goes to extreme lengths to perfect the record to avoid reversal on appeal.[375] Pointing to 100-page preambles that discuss every minor contention raised in the comments, they believe that such "overpreparation" of the record and "overexplanation" is unnecessary to meet OSHA's "substantial evidence" standard of review. Most industry representatives forcefully dispute this idea, maintaining that OSHA should always have a sound technical basis for its rules. The attorneys in the Solicitor's Office are also convinced that elaborate analysis and documentation is necessary to survive judicial review, and they explain that much of the delay caused by their office is due to its concern for the quality of the agency's analysis.[376] In their opinion, it is worth spending a few extra months perfecting a Federal Register document if it will avoid an even more time consuming court remand.

There is a generally shared belief among the lower level staff that past Assistant Secretaries, for whatever reasons, took too long to make policy decisions and communicate them to the staff. Many of the lower level staff related instances in which they had worked diligently on projects only to have them languish at high levels in the agency or the Department for

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[374] comment on that petition, but we do not read this recommendation to suggest that the agency use this process as a vehicle for gathering technical information. Should OSHA, in response to the ACUS recommendation, adopt a procedure for notifying the public of rulemaking petitions and soliciting public comment, we would urge the agency to put fairly strict deadlines on the response (e.g., 30 days), and we would urge the agency not to use the process as an excuse to delay in moving forward with the process of prioritizing the subject of the petition in its prioritization scheme. Our recommendation is that OSHA not routinely issue still another ANPR to gather information after it has decided to grant the petition.

[375] Harwood Interview, supra note 138; B. White Interview, supra note 59.

[376] Jacoby Interview, supra note 195.

weeks, months, or even years. Staff members were not given direct explanations for the delay, but usually assumed that the rules were being held up because of an inability or unwillingness on the part of upper level management to decide difficult questions. A related complaint is that upper level decisionmakers sometimes return controversial rules to the staff for further work on particular issues knowing full well that the additional work is not likely to be outcome-determinative.

It is difficult to determine how much of this perceived problem is attributable to an unwillingness or inability of upper level management to decide hard questions and how much is due to the impatience of agency staff and beneficiary groups. Without doubt some rules, like the still-germinating safety standard for the oil and gas industry, have been put off indefinitely out of upper level management fears of stirring up political controversy. But just as clearly, upper level management, which is ultimately responsible for the agency's output, has every right to demand further analysis of critical issues, even when it is not obvious to the staff that further analysis will change the ultimate outcome. Part of the problem is probably the lapse of "management memory" that accompanies the rapid turnover rate in OSHA's upper level management.[377] A legitimate query by a new Assistant Secretary who is unfamiliar with the history of an issue may be perceived by long-term agency staff as a deliberate attempt to slow down a rule's progress.

There is no easy way to address these potential sources of delay. Clearly, management should attempt to alleviate staff concerns that their efforts will be placed on the back burner for political reasons. One of the reasons that the 1982 procedural reforms failed was the failure of upper level decisionmakers to respond rapidly when Regulation Teams elevated issues to the Regulation Review Committee. Rather than wait for upper level decisionmakers to resolve such issues, the teams resolved them without upper level input, thereby contributing to the "renegade team" problem.[378] There is, however, a growing impression among lower level staff that the current Assistant Secretary is willing to make hard decisions within relatively brief time-frames.

To some extent the problem may be alleviated by better communication between staff and upper level officials. The staff must be sensitive to the realities of the political world in which upper level decisionmakers must deal. If lower level staff professionals were allowed to attend the Options Review meetings proposed in this Report,[379] there might be better communication about which projects warrant the most low level attention. In addition, the staff might gain a better understanding of the reasons that upper level managers have for delaying an initiative or reworking aspects of a preamble. The options review meeting would provide an opportunity for long-time lower level staff to communicate to new management the history of an issue, perhaps avoiding a time consuming "reinvention of the wheel." Of course, if lower level professional staff are to be privy to high level options review meetings where sensitive political considerations are debated, then they cannot feel free to leak the contents of such discussions to the media.

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[377] See text accompanying note 21, supra.

[378] See text accompanying note 361, supra.

Even in the absence of an Options Review process, upper level management should make greater efforts to keep lower level staff informed of the reasons for their actions, if only to give them guidance for next time. But beyond that, keeping staff informed of the reasons for management decisions makes the staff feel like they are part of a unified whole, rather than a neglected appendage. Greater upper level management attention to symbolic messages to lower level staff and the rest of the world, as suggested previously, may also help remedy this problem. If the staff and beneficiary groups believe that the Assistant Secretary and his top aides are genuinely trying to advance the agency's mission, they will more easily understand how outside considerations can force upper level management to lay back momentarily.

G. Inadequate Resources.

If OSHA is serious about increasing its ponderous rule-generating pace, it must demand a substantial infusion of resources. The Health Standards Directorate is seriously understaffed. Individual health professionals in that Directorate are responsible for multiple projects. While they are managing the rule-generation process for projects assigned to them, they must also answer petitions for new rulemaking initiatives, draft responses to TSCA referrals, meet with other agencies, and meet with other professionals from the private sector. The current professionals are, to put it bluntly, overworked. In addition, OSHA badly needs an infusion of fresh blood.[380] The creation of new positions in the Health Standards Directorate would allow the agency to hire new staffers.

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[379] See text accompanying notes 362-366, supra.

[380] Gas Interview, supra note 159.

RECOMMENDATION: OSHA should seek additional resources for the Health Standards Directorate. It should attempt to fill any new slots for occupational health specialists with highly motivated young professionals.

The recommendation that the agency seek additional resources in a time of severe monetary constraints on regulatory programs may well fall on deaf ears, but that makes the need no less critical. It is hypocritical for Congress and OMB to criticize OSHA for poor work if they are unwilling to provide sufficient resources for the agency to do a good job.

Whether or not OSHA gets new resources for expanding the size of the Health Standards Directorate, it can make some management improvements that should result in more efficient use of existing resources and that should make the real consequences of the agency's current resource squeeze clear. Adopting the recommendations suggested here cannot give the agency more resources, and in fact some of the recommendations require additional resources or a reprogramming of existing resources. Yet some changes are absolutely necessary if OSHA is to adequately discharge its obligation to provide safe and healthful workplaces for employees.

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-2

FEDERAL PROTECTION OF PRIVATE SECTOR HEALTH AND SAFETY WHISTLEBLOWERS

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Introduction and Summary[1]

Few areas of federal labor law are currently the subject of as wide public interest as "whistleblowing", a now familiar term for the dissemination by an employee of information critical of or reflecting adversely on an employer, typically for the purpose of correcting or preventing some violation of law or other harm to the public interest.[2] The most widely publicized recent episode--involving two engineers employed by Morton Thiokol Inc., a major National Aeronautics and Space Administration contractor for the ill-fated *Challenger* space shuttle--is only one in a growing series of incidents in which employees have alleged that they were retaliated against for whistleblowing in matters affecting health or safety.

Over a dozen federal laws attempt to protect whistleblowers from retaliation in wide areas of private sector activity where health and safety are at stake.[3] These laws, which protect both public and workplace health and safety interests, omit large and potentially important industries such as aviation and pharmaceuticals. In addition, they have created a crazy quilt of investigative, adjudicatory and review responsibilities. These are summarized in Table 1 below. There appears to be increasing Congressional interest in protecting yet other categories of whistleblowing.[4]

While a body of literature has developed concerning whistleblowing (and the promise of more to come), it is only now being recognized that these statutes form part of a larger whole. Until now, with a few notable exceptions,[5] little effort has been made to render a rational account of Congress' activity in this area and those who have become involved under one or another of the statutes have tended not to become involved in the others. Federal whistleblowing protection has probably been seen more as an appendage to the underlying substantive regulatory program, than as a focus for legal analysis in its own right or as a new subspecialty within the field of labor law. One of the purposes of this report is to suggest a different perspective: *viz*., that the varieties of legislative and administrative experience under the federal health and safety whistleblower protection provisions, taken as a whole, represent a "sea change" in labor law that merits study and legislative attention in its own right.

As Table 1 shows, under eight of the federal whistleblowing statutes, the Secretary of Labor has assigned investigative responsibility to the Wage and Hour Division, under two others to the Occupational Safety and Health Administration, and under one to the Mine Safety and Health Administration. Other agencies have important investigative or adjudicatory responsibilities as well. These include the Department of the

Interior, which has both investigative and adjudicatory tasks, the Department of Defense (as to DoD contractors), and the independent Mine Safety and Health Review Commission, whose job is only adjudicatory. With the exception of the relationship between the Wage and Hour Division and the Nuclear Regulatory Commission, there appears to be little active coordination among the agencies concerned.

Some of the statutes create elaborate hearing procedures; others are silent. They differ widely on matters as critical as the definition of protected conduct, the statute of limitations, remedies, and the machinery for adjudication and judicial review. Anomalies abound. For example, statutes of limitations range from 30 days to 6 months. Where whistleblowing in respect of violations of OSHA's own regulations are concerned, OSHA investigates, and adjudication is in the district courts. Where violations of the Surface Transportation Assistance Act of 1982 are in issue, on the other hand, OSHA investigates, but adjudication is by Department of Labor administrative law judges. The Mine Safety and Health Review Commission, an independent agency, decides whistleblowing cases; the Occupational Safety and Health Review Commission -- another independent agency -- does not. Some of the statutes cover safety-based refusals-to-work along with the kinds of disclosure most people think of as whistleblowing; some contemplate the award of punitive damages; some authorize temporary reinstatement while the merits of the case are being adjudicated.6/ Employees who lose at the agency level under most of the statutes may obtain judicial review; not so, however, in the case of violations of section 11(c) of the Occupational Safety and Health Act or section 211 of the Asbestos Hazard Emergency Response Act because the employees are completely dependent upon the willingness of the Labor Department to prosecute their causes on their behalf.

Because many of these discrepancies reflect vagaries of the legislative process as it has addressed various industries on an incremental or piecemeal basis over the years, a number of them are difficult to justify according to any neutral principle of public administration. On some issues, conscious substantive legislative choice and the political process are reflected in the current institutional arrangements for the protection of private sector health and safety whistleblowers. For this reason, as noted in the concluding section of this report, some of the matters that one might see every reason to alter may lie beyond the ordinary role of the Administrative Conference. On the other hand, the institutional hodge-podge described in this report transcends mere untidiness or asymmetry. At a certain point, divergent approaches can overwhelm the law by eroding public confidence in the fundamental coherence of the governmental process. That point has unquestionably been reached in Congress' efforts to protect those who suffer employee retaliation for calling attention to health and safety violations.

This report suggests that the Conference recommend (1) the enactment of omnibus whistleblower legislation uniformly applicable to all activities subject to health and safety regulation by the federal government in order to encourage private actions in support of those federal programs and to ensure fairness, uniformity and rationality in the adjudicatory and remedial processes, and (2) specific actions (identified below) to be taken by the Secretary of Labor to improve the administration of the current diversity of private sector whistleblower protection programs.[7]

Taxonomy and Terminology

Although much of the business of ensuring that the laws are observed have become the responsibility of government rather than private citizens, the Supreme Court has rejected the notion that private citizens have no role to play.[8] By way of preface, it may be appropriate to try to orient the whistleblower protection provisions within the range of tools available to government for the achievement of public objectives. Some of these tools are negative, and some are positive. Some are direct (*i.e.*, used by the government itself) and some are indirect (relying rather on private individuals). For example, imprisonment, fines, penalties and forfeitures are familiar sanctions government uses to achieve its ends. These are direct and negative (or disincentives).[9] Rewards[10] or *qui tam* provisions might be thought of as indirect positive incentives in that they rely on or seek to encourage private interests to help achieve public ends. In some circumstances, the law may create an indirect negative incentive to encourage private citizens to assist in suppressing crime, as in the case of the Tariff Act provision making it a misdemeanor to refuse to assist a Customs officer.[11] The whistleblowing anti-retaliation provisions of federal law are best thought of as the removal of a disincentive for private assistance in achieving public ends, since the purpose of such provisions is to hold harmless those employees whose information must reach the government in order to help achieve public goals.[12]

In addition to this taxonomic note, mention might be made of certain terminological pitfalls in the whistleblowing area. Thus, the phrase "employee protection" is occasionally used to describe whistleblowing anti-retaliation measures.[13] This term, however, is also used in other contexts that have nothing to do with whistleblowing, such as the arrangements under section 507(e) of the Federal Water Pollution Control Act for investigations into employees' complaints that an employer has discharged or discriminated against them because of effluent limitations or orders issued by EPA under that statute,14/ or the seniority-protective provisions of the Airline Deregulation Act of 1978.15/ One recent enactment uses the term "Public Protection," which is so vague as to be essentially meaningless.16/

The terms "discrimination" and "affirmative action" are used in describing protected whistleblowing and the fashioning of remedies, respectively. These obviously have special meanings in our society, and their use in this context can be a hindrance to understanding because it inappropriately implies a legal or doctrinal kinship with the race relations area, thereby bringing into play a very different set of concerns and values from those that underlie public policy in the whistleblowing area.

The Common Law Context

The background against which the federal legislation addressed in this study arose may be briefly sketched.17/ At common law (American, incidentally, rather than English), the rule evolved that an employee who did not have a contract that provided otherwise could be dismissed at the will of the employer. This doctrine is said to have its origins in a treatise published a little more than a century ago,18/ and promptly took root in the cases, which seem to have adopted this notion quite uncritically.19/ Eventually, however, some courts began to carve exceptions from the rule, and doctrines have arisen in a number of jurisdictions holding that there was a "public policy exception" to the "employment-at-will" rule. In summary, such exceptions hold that an employer will not be permitted to discharge an employee for conduct that advances a recognized public policy. The law on this point is essentially state law,20/ and the extent to which the doctrine applies to any particular set of facts is likely to vary dramatically from one jurisdiction to the next.

The Federal Legislative Response

In addition to judicial recognition of a "public policy exception" to the at-will doctrine, Congress and a number of state legislatures have enacted specific provisions ensuring protection against retaliation for employees who assert various rights. The federal legislation includes a variety of statutes, only some of which deal with public health and safety programs.21/ This report is confined to the measures protecting health and safety whistleblowers; a broader study may also be desirable at a later date to explore the need for rationalizing the total federal legislative scheme.

1. Public Sector Employees. Table 2 lists the various federal statutes that seek to protect from retaliation those public employees who engage in whistleblowing.22/ These statutes are beyond the scope of this study, but a few words may still be in order. The key statute is the Civil Service Reform Act of 1978, which created broad protection for disclosures by civilian federal employees. Disclosures relating specifically to health and safety form only a small part of the field of protected conduct, and it is believed that few of the whistleblowing cases that have arisen under the CSRA have involved health or safety considerations. Most CSRA cases have to do with allegations of waste, fraud and abuse.

The most recent addition to the list of public sector antiretaliation laws is the Department of Defense Authorization Act, 1987, which extends protection to defense contractor employees for disclosures to Members of Congress, DoD and the Justice Department "relating to a substantial violation of law related to a defense contract."23/ This measure is a modification of an earlier proposal that would have extended expressly to disclosures relating to "substantial and specific danger to public health and safety." In addition, the earlier version protected military personnel as well as contractor employees from reprisals.

2. Private Sector Employees. The range of federal statutes protecting private sector employees who "blow the whistle" on health and safety problems is considerable. These are set forth in Table 1. Together, they cover a large part of the American work force, and fall into several broad categories. Some are industry-based, such as those affecting mining, the nuclear industry or particular transportation modalities. Some address sweeping environmental concerns, such as those for which EPA is the program agency. And some cut across the broad spectrum of industrial activity in the country, such as OSHA, NLRA or LMRA.24/ The same conduct may violate more than one statute, thus involving multiple decisional tracks.25/

The effectiveness of these arrangements is open to question. As two perceptive students of the field recently wrote, "[t]he record is particularly grim in industry; not one of the industrial whistleblowers we studied survived on the job."26/ "With few exceptions, they are driven out of not just their jobs, but their professions, too."27/

3. "Twilight Zone" Cases. In a number of instances, it may be difficult to characterize the class protected by a whistleblower statute as "public" or "private." For example, the 1984 Defense Department authorization extended whistleblower protection, including health and safety disclosures, to employees of

nonappropriated fund activities. Section 211(a) of the Asbestos Hazard Emergency Response Act of 1986 protects all persons from discrimination, but specifically includes employees of state and local educational agencies. State employees have found protection under the Safe Drinking Water Act,28/ and at least one case involving a federal employee--that of EPA employee Hugh Kaufman --has been filed with the Department of Labor under the Comprehensive Environmental Response, Compensation and Liability Act of 1980. Government contractor employees have been held to be protected under several of the whistleblower statutes.29/

4. Caseload. Basic caseload figures for private sector health and safety whistleblowing cases in Fiscal Year 1985 appear in Table 7. The data show that by far the largest single category of complaints is under section 11(c) of the OSH Act. These cases, however, do not involve agency hearings; if OSHA finds the case meritorious, it brings a civil action on behalf of the complaining employee. The only intra-agency remedy a complainant has is to seek review within OSHA of an initial decision not to pursue the case.30/ As the table shows, very few section 11(c) cases are pursued by the Department.31/

The section 11(c) complaint caseload appears to have been fairly stable over the last several years.32/ For example, in FY78, OSHA received 3,000 employee complaints.33/ The corresponding numbers for FY83 and FY84 were 2522 and 2813, respectively.34/

The next-largest group of cases involves the Surface Transportation Assistance Act, under which OSHA received 354 complaints during FY84.35/ The number of complaints declined to 248 in FY85.36/ "[I]n the first half of 1984, only eight cases were found to have merit. By the end of the year, twenty-five merit findings had been issued, and in 1985 fifty-eight merit findings were issued."37/ In FY85, the OALJ docketed 20 STAA cases following OSHA investigation, and conducted 6 APA hearings.

Third in frequency are retaliation complaints under the Federal Mine and Safety Health Act. MSHA investigated 276 complaints of safety- or health-related discrimination that were filed during FY85.38/

The Department of Labor has created an Office of Administrative Law Judges to adjudicate cases under a broad range of statutory programs, most of which have nothing to do with whistleblowing. That office is, however, also responsible for a substantial part of the overall whistleblower caseload. Taken together, the OALJ received 77 such cases during FY85 under the various whistleblowing statutes it administers (including the 20 STAA cases referred to above). Of these, the vast majority were nuclear cases brought under the Energy Reorganization Act. Overall, the OALJ has received 264 whistleblowing cases since 1980.39/ The number of whistleblower complaints received by the Department of Labor is not available at this writing, but it appears that in FY85, the Wage and Hour Division conducted approximately 50 investigations under the statutes for which it is responsible, of which about half were found to be meritorious.

Statistics concerning the incidence of whistleblowing cases brought before the NLRB are also unavailable, although case summaries furnished by the Board's Office of General Counsel indicate that health and safety issues are not uncommon in Labor Board proceedings.40/

There have been very few discrimination complaints under the Surface Mining Control and Reclamation Act.

For comparative purposes, during FY85, the Office of Special Counsel of the Merit Systems Protection Board received 135 whistleblowing disclosures from federal employees.41/

Shortcomings of the Current Arrangements

1. Jurisdictional Lacunae - The most obvious shortcoming of the current federal legislation protecting health and safety whistleblowers is the omission of major sectors of the economy where health and safety are unquestionably at stake. For example, Congress has yet to extend whistleblowing protection to: aviation, aerospace, vessel construction and operation, food and drugs, medical devices, and consumer products generally. While the major environmental laws administered by EPA include whistleblower provisions, one -- the Noise Control Act of 1972 -- does not. Even where the industry itself is covered, the statute may be written to exclude persons whose jobs have safety implications.42/

A major omission has long been the vast number of government contractors to the extent that their activities were not covered by any of the subject-matter-specific antiretaliation statutes. For example, in 1974, the Department of Labor and the Atomic Energy Commission acknowledged that ". . . Section 4(b) (1) (of the OSH Act) renders OSHA inapplicable to the working conditions of AEC contractor employees working in Government-owned or -leased, contractor/operated facilities as long as AEC continues to prescribe and enforce radiological and non-radiological occupational safety and health standards." This kind of gap has been addressed in a variety of ways, including internal agency regulations or contractual provisions.43/

Congress has also begun to recognize the need for coverage of government contractors in general. For example, in the aftermath of the Challenger disaster, Representative Markey observed:

> If the Morton Thiokol engineers were Federal employees, they would have recourse through the Civil Service Reform Act and the Office of Special Counsel. But as employees of a Government contractor, they have no protection.44/

How whistleblowers such as the Morton Thiokol engineers ought to be protected may well raise difficult drafting problems, since it appears that their expressions of concern were not couched in terms of violations of federal regulations, but rather involved a degradation of safety standards peculiar to the shuttle effort. Whether safety concerns voiced within a company ought to be protected is a matter of considerable controversy, and Congress would do well, in framing generic whistleblower protective legislation, to consider carefully how such legislation would have affected the Challenger case.

Congress has not yet passed general whistleblower protection for employees of government contractors, although it has done so for Department of Defense contractors in the Department of Defense Authorization Act, 1987.45/ Prior to passage of that legislation, a Defense Department contractor employee alleging retaliatory discharge could try to sue under the False Claims Act,46/ although the gravamen of such a case is fraud on the government rather than harm to the employee. Generic protection for contractor employees was introduced in the 99th Congress47/ and will be reintroduced in some form in the 100th.

Of course, not all health and safety programs involve concerns of the same gravity and magnitude. To take an obvious example, the potential health and safety implications of many violations of NRC regulations could be of a different order of magnitude from an isolated violation of trucking safety regulations. Comparing safety programs requires a consideration not only of the magnitude of the hazard, but also the probability of its occurrence. Perhaps a standard could be developed under which one could argue that different measures of employee protection are appropriate in different industrial or other contexts. On the other hand, one would think that anything that was sufficiently charged with a public interest to warrant federal regulation in the first place should also warrant protection for whistleblowers simply as an aid to enforcement and ensuring voluntary employer compliance with the underlying safety and health requirements.

One thoughtful reviewer of the draft of this study cautioned that expansion of whistleblower protections to persons in highly sensitive positions might make it too difficult to remove an incompetent or malicious employee. Where the superior can anticipate that his own integrity may be put in issue in the adjudicatory process, there may be a chilling effect on his or her willingness to take needed disciplinary action. The net result would be contrary to the public interest of health and safety.48/ This factor is difficult to assess in empirical terms, but there does seem to be a satisfactory response to it: the adjudicatory process must be reasonably prompt and reliable, and so managed as to offer no reason for malcontents or marginal performers to see it as an insurance policy against proper discipline. Agency decisionmakers should be alert to the detrimental effect on health and safety if managers and supervisors form the opinion that turning a blind eye to poor work is preferable to the inconvenience of an investigation and possible hearing. If supervisors are not to be deterred from performing their jobs, the process should be as free of wasted time and effort as possible. Nonetheless, as in any disputatious setting, there will always be some who are so put off at the prospect of a government investigation that they may "put up" with a poor performer longer than they should. There is, in this, however, nothing peculiar to this setting; how long would an unsafe employee be retained even though firing him or her would trigger some other kind of discrimination claim?

2. Protected Conduct. The health and safety whistleblowing statutes basically protect two kinds of conduct: (a) disclosures and, in a few instances, (b) refusals to work. In neither category has Congress acted uniformly.

(a) Protected Disclosures. Table 4 summarizes the statutory provisions that define protected disclosures. As a brief review of that listing will show, Congress has used a wide range of terms to describe the disclosures it wants to protect. It is however, difficult to understand why a uniform set of concepts could not be substituted.

To identify a few of the variations, there are provisions that apply to any disclosure (AHERA) disclosures to the media (OSHA),49/ disclosures to the agency or agencies responsible for administering the underlying regulatory program (*e.g.*, ERA), and disclosures to a union (FMSHA, OSHA) or employer (FMSHA, OSHA, SMCRA). The circuits are split on whether the ERA protects "internal" complaints to an employer.50/ The underlying validity of employee safety concerns under the ERA and environmental statutes has been held to be beyond the Labor Department's jurisdiction; the disclosure need only be made in good faith.51/

Retaliation against concerted activity in response to safety concerns has been held to be an unfair labor practice by the NLRB, but the Board has recently emphasized that it "was not intended to be a forum in which to rectify all the injustices of the workplace."[52] Given the requirement for concerted activity, and the Board's emphasis on the fact that the employee in Meyers (a truckdriver who was retaliated against for refusing to work and reporting a safety violation to state authorities) might have an action under state law or (had it been in effect at the time) under the STAA, it seems improbable that the NLRA will prove to be of substantial benefit to whistleblowers who act alone -- particularly if their conduct might also be protected under other legislation.[53] Indeed, the current Board has expressly disclaimed an interest in "taking it upon ourselves to assist in the enforcement of other statutes."[54] This narrow perspective would seem to be at odds with the philosophy underlying the whistleblower provisions, the basic purpose of which is to assist in the achievement of substantive federal health and safety objectives. Because the statute of limitations for unfair labor practice complaints is longer than most of the whistleblowing statutes, contraction of the NLRB's role effectively reduces the protection available to employees. Meyers suggests that Congress should not look to the broad coverage of the NLRA as a reason to refrain from enacting generic private sector whistleblower legislation. The case has been appealed again to the District of Columbia Circuit.[55]

(b) Refusals to Work. Employee refusals to work are protected under the Energy Reorganization Act, Federal Mine Safety and Health Act, Federal Railroad Safety Authorization Act, Labor Management Relations Act, National Labor Relations Act and Surface Transportation Assistance Act.[56] The NLRA protects only "concerted activity" under section 7, rather than individual conduct.[57] Unless the refusal to work is part of a group effort or is an individual effort intended to enlist the support of others, or involves the assertion of a right grounded in a collective bargaining agreement,[58] it will not be protected, according to the NLRB's latest pronouncement on the issue.[59] Section 502 of the LMRA applies to employees who stop work "in good faith because of abnormally dangerous conditions,"[60] but it is unclear whether the provision protects only those workers actually at risk, or others who join with them.

In addition to the statutory provisions, safety-based refusals to work are protected by a regulation issued under the Occupational Safety and Health Act,[61] and upheld by the Supreme Court in Whirlpool Corp. v. Marshall.[62]

The refusal to work provisions typically require that the employee have an actual reasonable belief that he is in danger.63/ For example, the STAA provides:

> No person shall discharge, discipline, or in any manner discriminate against an employee . . . for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial vehicle safety and health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. . . . 49 U.S.C. sec. 2305(b) (Supp. III 1985).

3. Limitation of Actions. As shown in Table 1, the range of statutes of limitation applicable to health and safety whistleblowing complaints is considerable and, given the plain kinship among these statutes, intellectually indefensible. Absent some showing that would justify differences from one setting to another--and the author has been unable to discern the basis for such a showing--a single statute should govern.

What should the limitation period be? This is necessarily a matter of legislative judgment, and should reflect the fact that employers are unlikely to tell an employee that he or she is being dismissed as a reprisal for whistleblowing. as a result of this factor, the employee may not be aware at the time of discharge that a statutory right has ben contravened.

If an employee must file more than a "notice of appeal" to trigger the whistleblowing hearing processes,64/ a 30-day statute is unreasonable, even if a notice is required to be posted advertising the complaint process. Moreover, an employee may well find it impossible to find counsel who can prepare a complaint in such a short period, particularly since much whistleblower litigation is conducted on a contingent fee basis in the hope of securing an award of attorneys fees. As shown in Table 8, a significant number of the whistleblowing cases brought to the DOL Office of Administrative Law Judges are dismissed for untimeliness. Other cases are dismissed for untimeliness by the investigative agencies. On balance, and considering the potential complexity of these cases, a single statute of limitations of not less than 180 days seems appropriate.

4. Investigative Arrangements. Table 1 identifies which agency is responsible for the investigation of whistleblower complaints under the private sector statutes. The Wage and Hour Division has been given responsibility for seven of the statutes under which hearings are conducted by the DOL Office of Administrative Law Judges, as well as for two statutes (FLSA and MSAWPA) under which adjudication is performed by the district courts.65/ OSHA is responsible for STAA cases that are eventually heard by the OALJ, as well as violations of OSHA's own regulations, which are heard in the district courts.

The basic issue that emerges from the assignment of investigative functions is whether those functions should be performed by the agency with responsibility for the underlying substantive safety program. On the one hand, if the subject matter is complex or technical, it could be argued that only the program agency would have the technical expertise necessary to evaluate whistleblower cases. On the other hand, there may be concern that the program agency might be less than impartial in whistleblower cases to the extent that a whistleblower's charges may be thought to imply that the program agency was ineffective.66/ Some program agencies are considered to be too sympathetic to the regulated industry, and lack of resources may lead to "dispirited" enforcement of safety regulations.67/ Congress recognized the possibility that an agency might have a conflict of interest, for example, when it broke up the former Atomic Energy Commission (which had both regulatory and promotional responsibilities) into the NRC and the former Energy Research and Development Administration.68/

The case for having adjudication handled by the program agency based on the theory that substantive expertise in the underlying technical field is required is unpersuasive. For one thing, the program agency would always be available to supply expert witnesses on any truly technical issues, a technique that would presumably be used today in those cases that arise under statutes where adjudication is handled by the district courts, which can claim no special expertise. More to the point, the whstleblowing statutes do not require a determination that the complainant's safety concern is technologically "correct," but rather that it is merely reasonable inthe circumstances. To be sure, even that question imposes on the decisionmaker an obligation to assess the merits of the worker's health or safety concern, but the burden on the decisionmaker would seem to be muchless onerous than might be the case if the complainant were protected from reprisal only if his or her safety objection was not only reasonable but "correct."

Congress has not yet taken a clear position on the generic issue of agency conflicts, although under seven of the whistleblower statutes (DoD87, FMSHA, FRSAA, MSAWPA, NLRA, OSHA, SMCRA) the program agency is also the whistleblowing investigative agency.69/ While the statutes under which these roles are combined involve technical areas such as the environmental and nuclear contexts, certainly there are also technical aspects to cases arising under the two mining statutes, under each of which the program agency also investigates. To the extent that a statutorily independent Inspector General is assigned investigative responsibility under DoD87, the danger of institutional conflicts of interest would appear to be minimal under that particular statute.

One useful approach might be to recognize that the investigation of whistleblowing is itself a specialty, and that the public interest would be served by having a single agency responsible for all whistleblowing investigations. Which agency that should be is not crucial, but presumably it should be one that is currently responsible for a substantial share of the government's total incoming caseload of whistleblower complaints. The available data,70/ tend to point toward OSHA, although the Wage and Hour Division has also amassed valuable experience under the varied statutes for which it has responsibility. The choice is probably best left to the Secretary of Labor. In any event, there is no need to add a brand new agency or additional staff for this purpose; the non-OSHA caseload data suggest that interagency transfers would suffice to meet any shift in agency responsibilities. If, on the other hand, substantial new categories of employees are brought under whistleblower provisions, some net increase in staff would be needed, unless there is slack available at present.

The program agencies should play an active role in support of the investigative agencies, even if they do not themselves have investigative responsibility. In technical cases, the program agencies can (and already do, on occasion) furnish technical advice to the investigative agencies. They can also be asked to provide expert witnesses or technical interrogators for hearings. At times, they might wish to appear as *amici* in the whistleblower hearings.71/ And, to be sure, they *should* in each case receive reports on the outcome of hearings so that they may take whatever followup actions may be appropriate in light of the facts developed in the adjudicatory process. These reports should include the adjudicatory decisions as well as the investigative agency's comments and analysis, where appropriate.

The program agencies should take affirmative steps in aid of whistleblower protection, such as the issuance of employee protection regulations that could be enforced in the licensing context, where appropriate, as the NRC has done.72/ They can also impose useful notice-posting requirements by regulation so that employees will know in advance of their rights under the employee protection statutes.73/ This is particularly appropriate if Congress continues to insist on unrealistically short statutes of limitation.

Concern has been expressed over the short time typically allowed to the investigative agencies for processing employee complaints. Rather than simply eliminating the investigative phase (e.g., permitting the employee to institute an APA hearing without prior agency screening),74/ attention might be given to providing that if the investigative agency has not completed its investigation within a fixed period, the employee at that time could obtain an APA hearing on request.75/ The disadvantage of such an arrangement would be that the employee would be deprived of the potentially useful initial reaction of the agency: at present, a favorable initial ruling may be critical to the employee's ability to obtain counsel on a contingent fee basis.76/

Another issue concerns the desirability of requiring or encouraging an employee to exhaust remedies provided by the employer as a precondition to an agency hearing.77/ Table 5 identifies those employee protection programs that require or suggest such exhaustion. Many firms today have internal mechanisms for the receipt of employee safety complaints; a few have contracted with outside companies to provide an external private dispute-ventilation machinery.78/ Before a broad requirement for such programs is imposed, however, serious thought should be given to the fact that an exhaustion requirement may only retard employee access to the public adjudicatory process, and arguably provide the employer with an unfair opportunity forearly discovery possibly before the employee has legal representation. If attention is given to requiring such programs, the concerned agencies will have to address the discoverability of documents generated during the process (a matter that has already arisen in at least one case arising under the ERA)79/ and the need to toll the statute of limitations during exhaustion. One attorney representing employers has indicated that documents and statements generated by both sides in the course of exhaustive internal channels would be discoverable.80/ The author's view, on the basis of the information currently available, is that the public interest in prompt disposition of employee protection complaints outweighs the competing interest in potentially reducing the need for recourse to formal governmental processes. Certainly public policy "should not aim at driving every internal dispute toward litigation,"81/ but the system should also not create excessive hurdles.

5. Adjudicatory Procedures. Nowhere is the lack of consistency in federal protection of whistleblowers more apparent than in the arrangements Congress has directed for adjudication of complaints. As shown in Table 1, in 8 instances (involving cases arising under the environmental laws and the STAA), on-the-record APA hearings and recommended decisions are the task of the DOL Office of Administrative Law Judges,82/ subject to final action by the Secretary of Labor,83/ with the assistance of the DOL Office of Administrative Appeals. One source of concern has been the lack of detailed regulatory guidance as to the procedures to be followed in connection with review by the Secretary.84/ The Department of Labor has shown its concern over the case backlog in the Office of Administrative Appeals.85/ An additional step it should take to streamline that final layer of agency review would be to promulgate formal rules of appellate procedure. It has also been suggested that a 3-member appellate panel should be created to review ALJ decisions in whistleblower cases, and to permit interlocutory appeals from ALJ decisions on certain issues.86/

Like DOL, the NLRB, Mine Safety and Health Review Commission and Interior Board of Land Appeals also provide on-the-record APA hearings. In railroad cases, the decisional body is the National Railroad Adjustment Board which does not provide an APA hearing, and in four categories of cases (nonappropriated fund employees, shipping containers, migrant workers and OSHA), the adjudicatory mechanism is a civil action in district court.

Given the caseload of the district courts, reliance on conventional civil actions rather than appellate court review of agency action in several of these important antiretaliation programs makes little sense. And in the case of complaints under section 11(c) of the Occupational Safety and Health Act, such reliance makes no sense at all when combined with the fact that the complainant has no control over the litigation, i.e., if the agency chooses to dismiss a complaint, the employee can only appeal that decision within the Department of Labor;87/ there is no provision for judicial review of the agency's decision not to pursue a section 11(c) case and no private right of action under that provision.88/ This is in sharp contrast with the other provisions which permit an employee who is disappointed with the outcome of an agency APA hearing to seek judicial review.

Another noteworthy aspect of the adjudicatory process involves the responsibility for representation of the employee. In MSHRC proceedings, the miner is prepresented by MSHA if the agency believes the complaint to be meritorious,89/ but in OALJ cases under the envirnomental laws, the Wage and Hour Division and the Secretary represent neither party.90/ Under the STAA, the Assistant Secretary for Occupational Safety and Health can prosecute the trucker's case in the OALJ hearing.91/ Under the NLRA, the General Counsel prosecutes.

Here again, the reasons for the discrepancies from one program to another are difficult to fathom. One would think that the same rule should apply across the board, but at the same time it is not clear tht every complainant will want or need the prosecutorial assistance of the investigatory agency. Where the complainant is privately represented, the interest in careful husbanding of agency resources (including the need to limit what might otherwise be redundant presentations in the hearing) suggests that the agency should step aside--not dropping out of the proceeding, but taking a more passive role, in deference to the trial strategy of the party's chosen counsel. That role would differ if the individual chooses to represent himself or herself, in which case a more active posture would be appropriate, in the interest of ensuring a full and effective airing of the issues. In short, the Secretary should not be required to represent a party who already has counsel, but if the investigatory agency concludes that the case is meritorious, it should be available to prosecute if the complainant so desires.

The statutes frequently set forth a schedule for agency action on the employee's complaint.92/ These schedules are more honored in the breach than the observance,93/ and they probably serve little practical purpose.94/ To the extent that they indirectly encourage hasty investigative agency positions in complex cases, they may well be counterproductive. Table 8 shows elapsed time for DOL case processing. To some extent the numbers may be misleading since it is often the case that both sides--and the ALJ--will agree that more time is needed if the substantive purpose of the statute is to be served. Litigants may and often do want to relax the schedule in any given case if, for example, more discovery is needed, or anticipated procedural or evidentiary complexities arise. The consented-to delays do not account for all the cases, but they suggest that a "rule of reason" or modus vivendi evolves, whatever the statutory language. The extreme delays in some cases are, however, whether consented to or not, a matter of concern, and the responsible officials may want to ensure that case-tracking mechanisms are in place to keep matters from getting out of hand.

Not suprisingly, both employer and employee representatives have expressed frustration with the current arrangements for DOL hearings. For example, employee counsel have called attention to what they perceive as a pattern of discovery abuse by industry counsel.95/ In one current case, there is a dispute over whether an employer's counsel frustrated the employee's ability to obtain the testimony of a needed witness.96/ On the other hand, some believe that there is a danger of providing a forum for frivolous claims, with no penalty to the complainant who can impose substantial costs on an employer simply by filing a complaint.97/ This criticism overlooks the fact that if a complainant violates an ALJ order, he may be defaulted,98/ although that is not a complete answer to the objection. None of the statutes provide for attorneys fees to be awarded against complainants.

To the extent that the current arrangements are deficient in failing to provide for judicial enforcement of DOL subpoenas, that omission should be remedied as soon as possible along the lines available for enforcement of other agency subpoenas.99/ Until Congress takes such action, the main protection against stonewalling in discovery is the availability of adverse inferences100/ or sanctions such as those provided under Rule 37(b)(2) of the Federal Rules of Civil Procedure. Sanctions alone, however, are not a sufficient response to willful failure to cooperate with discovery in a health or safety whistleblowing case because more is at stake than merely the outcome of the individual case. The public interest may require that the facts be developed in such a case, not simply that the individual employee obtain relief, whether through sanctions or a settlement. Moreover, even after judicial enforcement of subpoenas becomes available, ALJs should still be at liberty to draw adverse inferences or impose sanctions in the event of failure to make discovery because the need to apply to a federal court for subpoena enforcement may be too time-consuming and costly for the party seeking enforcement101/--even though enforcement proceedings are supposed to be summary in nature.102/ A party's failure to press for judicial enforcement of an agency subpoena should for this reason not preclude either adverse inferences or appropriate agency sanctions.

Misconduct by counsel--another of the charges levelled by the complainant bar--is a serious matter that can thwart the achievement of congressional objectives and thereby endanger public health and safety. The arrangements currently in place certainly give agency decisionmakers ample authority to penalize such misconduct, and that authority should be invoked when good cause is shown.103/ In the unlikely event that ALJs prove to be indifferent on this score, the Secretary of Labor can be expected to take a firm stand on review. In addition, the usual forums for the consideration of ethical violations remain available. If the misconduct goes to far as to deprive a party of a fair hearing, the decision should be set aside on judicial review.

6. Remedies. The basic remedies available under the employee protection statutes are the familiar ones of backpay, reinstatement and attorney fees. In some instances, additional relief may be ordered. For example, actual damages are authorized under a number of statutes, and a variety of kinds of injury have

been compensated for under those provisions.104/ These include medical expenses, front pay, and job search expenses. In one ERA case, an employee was awarded $10,000 for mental pain and suffering and injury to reputation.105/ Another received $70,000 "to cover past and future medical expenses . . . and as recompense for . . . humiliation and mental suffering."106/ Exemplary or punitive damages are specifically authorized under only two of the environmental employee protection provisions (SDWA and TSCA); in other contexts the Department of Labor has held such damages to be unavailable.107/ Why those statutes alone have that provision is unclear aside from having been inspired by a common model. There is no conceivable reason for this discrepancy; a single rule should apply.

Agencies are also authorized to order abatement of the employer's conduct as well as "affirmative action," although little, if any, use has been made of the latter power. It is to be expected that future cases will see an increase in use of the "affirmative action" power.

Under the FMSHA and STAA, Congress has authorized interim relief of temporary reinstatement pending of complaining employees. Under both of these provisions, temporary reinstatement without a prior evidentiary hearing has been found unconstitutional; in the STAA case, the Supreme Court has the matter under advisement.108/

Other remedies may well be available through the program agency if, for example, that agency is responsible for licensing the employer in some fashion. This is true under the Atomic Energy Act, and the NRC has taken administrative action against licensees on the basis of whistleblowing by employees.109/ However, as the NRC has indicated,110/ "the action taken by NRC focuses on the licensee to change the conduct of the discriminator. It is not a direct remedy to the employee."

7. Judicial Review. The arrangements for judicial review, outlined in Table, 1, fall into two basic categories. In the case of surface mining and railway whistleblowing, review lies in the district courts; in the other cases, agency action is reviewed in the courts of appeals. Given the similarity of the issues likely to be explored in all such cases, uniform review at the court of appeals level (in keeping with a prior Conference recommendation) would be appropriate once there was underlying uniformity as to agency hearing procedures. Since surface mining cases go through the Interior Department hearing process with review by the Board of Land Appeals, there would seem to be no reason to require an intermediate stop at the district court.111/

A more fundamental concern has to do with the fact that under OSHA and the Asbestos Hazard Emergency Response Act, if the investigatory agency declines to bring a civil action for the employee, the employee cannot obtain judicial review of that decision, and also cannot bring his own action against the employer. Agency decisions not to prosecute are understood to be non-reviewable, but that doctrine would seem to have no application where an individual employee has been harmed by the violation of a prohibition on retaliation. There is no apparent reason for closing the courthouse doors to such individuals while keeping them open under so many of the other statutes. If nothing else, such an approach drives whistleblowing cases into the state courts under state doctrines, even though the federal interest may be paramount.112/

8. Interaction with Program Agencies. As Senator Grassley stressed at the Conference's October 1, 1986 public hearing, it is important not only that the whistleblower be protected from retaliation, but also that the substantive safety and health concern be addressed.113/ This requires close coordination between the agencies responsible for the underlying regulatory program and those responsible for administration of the anti-retaliation provisions.

To date, the program and investigative agencies have taken some steps to foster coordination to achieve better compliance with underlying safety and health obligations. Thus, the Wage and Hour Division and the NRC have a Memorandum of Understanding ("MOU") setting forth the working arrangements between their two agencies in nuclear whistleblowing cases.114/ That arrangement is viewed as ineffective by attorneys representing employees.115/ Similarly, OSHA and the NLRB have an MOU for the coordination of litigation under section 11(c) of OSHA and section 8 of the NLRA,116/ and MSHA and the Labor Board have entered into an agreement for the overlap in their jurisdictions.117/ Other agencies have not pursued the same approach.118/ For example, the Department of Transportation has only an informal working arrangement with the Department of Labor for cooperation in cases arising under the Surface Transportation Assistance Act,119/ and EPA (which has substantive responsibility for several environmental laws that have antiretaliation provisions) has no written understanding with DOL. It also remains possible for a single act of retaliation to trigger more than one statutory scheme. Where this is the case, the agencies should either be permitted to conduct a joint hearing or one should serve as "lead agency" for the dispute. If all federal anti-retaliation protections were consolidated, the potential for wasteful duplication would be avoided.120/

Given the fact that whistleblower protection is, after all, intended to protect public health and safety, formal arrangements should be in place to ensure (1) that all investigative agencies receive necessary assistance from program agencies, particularly in cases where technical information is important; (2) that program agencies receive prompt detailed reports of the results of all whistleblowing adjudicatory proceedings; and (3) that complaining employees be advised of the action taken by program agencies to remedy the safety problem about which the whistle was blown.121/

9. Access to Law and Interagency Doctrinal Growth. Two final and, to a degree, related concerns involve the public availability of decisional law and the impediments to interaction between the separate bodies of law being developed by the adjudicatory agencies responsible for the various whistleblower statutes. While the decisions of the MSHRC, NLRB, and Interior Board of Land Appeals are reported, those of the DOL Office of Administrative Law Judges are not. OALJ decisions have been available only in Washington.122/ That office is responsible for a substantial portion of the overall whistleblower caseload. The result is that litigants before the OLJA have a more difficult time ascertaining the law (thus making proceedings less focused than might otherwise be the case, as well as making it more difficult for employers and employees even to know their basic rights). In addition, the desirable goal of cross-fertilization between the OALJ and other whistleblower adjudicatory agencies is thwarted. This insulation makes little sense and (building on the statutory patchwork) tends to retard the development of a coherent body of law in this area.

Fortunately, the Department of Labor has announced that it will publish all OALJ and Secretarial decisions in whistleblower cases beginning January 1, 1987.123/ This is a desirable step for which the Department should be commended, since employees and employers will be better to determine in advance what is lawful and what is not. However, it would also be useful if pre-1987 decisions were published as well. It is assumed, of course, that appropriate indices will also be provided.

Whether publication of the OALJ decisions is sufficient remains an open question. At present, doing research that steps from one anti-retaliation program to another is needlessly cumbersome because of the variety of reporting services. Publication of the OALJ cases will only partially alleviate that problem. If digesting and indexing continue to be according to separate designs for each agency with responsibility for whistleblowing cases, the present system will not have been improved as much as it could be. This is not to suggest that the bar currently confronts a "Tower of Babel" in the whistleblowing area, but the present arrangements necessarily leave the door open to doctrinal variations where these may be unwarranted. If Congress decides to bring all private sector health and safety whistleblowing jurisdiction under one "roof" with a single set of statutory provisions administered by a single agency, this concern will go away; if Congress does not, serious attention should be given to integrating the reporting arrangements.

Relation to Prior Conference Recommendations

The subject matter of this report touches on several prior administrative conference recommendations:

(a) Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies (Recommendation No. 69-6). While the agencies that were contacted were generally forthcoming with statistical data, in a number of instances it was difficult to obtain important detailed caseload data. The Conference may wish to separately evaluate the effectiveness of data-gathering and -organization from this perspective.

(b) Discovery in Agency Adjudication (Recommendation No. 70-4). In keeping with paragraph 9 of this recommendation, Congress should ensure that agency subpoenas may be issued and judicially enforced in all whistleblowing cases.

(c) Subpoena Power in Formal Rulemaking and Formal Adjudication (Recommendation No. 74-1). The APA amendment prepared by the Conference would ensure compliance with agency subpoenas in whistleblowing cases, thereby improving the quality of agency decisionmaking and the record available for judicial review.

(d) The Choice of Forum for Judicial Review of Administrative Action (Recommendation No. 75-3). In keeping with this recommendation, it is presumed that review of agencies' formal adjudication be in the courts of appeals would be the norm with enforcement by the district courts.

(e) Time Limits on Agency Action (Recommendation No. 78-3). The Conference has questioned the use of legislatively-imposed time limits. While a *modus vivendi* has been reached in the context of the whistleblowing statutes here reviewed, any new legislation should not include such a requirement. Reasonable dispatch should still be the goal, as a matter of agency self-discipline. The available data suggest that it is unrealistic to try to force investigative or adjudicatory process into a rigid timetable. However, Congress might want to consider making it clear that if a deadline for agency action passes without such action, the employee or employer should be able to obtain an APA hearing without having to wait further. Similarly, if final action is withheld beyond the date prescribed, judicial assistance should be forthcoming more readily than has heretofore been permitted by the courts.124/

(f) Agency Structure for Review of Decisions of Presiding Officers under the Administrative Procedure Act (Recommendation No. 83-3). Reference is made below to the need to articulate the procedures for secretarial review of decisions of the DOL Office of Administrative Law Judges.

(g) Preemption of State Regulation by Federal Agencies (Recommendation No. 84-5). It is improbable that a federal agency would have occasion to directly address the question of preemption in a whistleblowing case, unless, for example, a state remedy had been invoked and one side or the other sought to rely on the result for collateral estoppel or res judicata purposes. This seems unlikely because federal statutes of limitation almost certainly mean the federal case would proceed more promptly than the state case. Nonetheless, if such an issue were to arise, the views of the affected state(s) and other interested parties should be obtained in the adjudicatory process through invited amicus presentations. Preemption is further addressed below in the Conclusions and Recommendations.

(h) Coordination of Public and Private Enforcement of Environmental Laws (Recommendation No. 85-3). The information-sharing concerns noted in paragraph 2 of this recommendation apply mutatis mutandis to federal whistleblower programs.

(i) Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3). The Conference's recent recommendation concerning ADR arguably bears on the private sector whistleblowing cases. While some private dispute-settlement or avoidance techniques have been tried with a view to encouraging the flow of safety concerns and defusing potential retaliation claims (particularly within the nuclear industry), it is believed that it would be premature to require any such procedure as a precondition to federal administrative adjudication. The Conference might, however, want to suggest that the concerned agencies consider the statute of limitations tolled while permissive internal employer remedies are being exhausted.

Conclusions and Recommendations

Clearly there are important questions for Congress as a result of any careful examination of the current arrangements for the protection of private sector health and safety whistleblowers. Some of these are, the author believes, appropriate for Conference recommendation because they involve issues that are essentially policy-neutral. Based on the study results outlined above, the Conference should make recommendations to the Congress and involved agencies as follows:

(a) Congress should enact omnibus whistleblowing legislation to replace all extant federal private sector health and safety whistleblowing provisions. That legislation should include:

(i) protection for all private sector employees (including government contractor employees) and state and local government employees against retaliation for whistleblowing with respect to violations of federal safety and health requirements;

(ii) assignment of investigative responsibility to the Secretary of Labor for all private sector health and safety whistleblowing retaliation cases;

(iii) provision for on-the-record Department of Labor APA hearings in all private sector health and safety whistleblowing cases, with discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts;

(iv) a single definition of protected conduct;

(v) a single statute of limitations of not less than 180 days;

(vi) a single provision for remedies (including debarment and suspension of government contractors);

(vii) a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and

(viii) a grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice posting requirements and mandatory coordination with program agencies.

(b) Subject to action by Congress as recommended above, the Secretary of Labor should:

> (i) promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of decisions of the Office of Administrative Law Judges;
>
> (ii) transfer all private sector health and safety whistleblowing investigative responsibility to the Occupational Safety and Health Administration, since (under section 11(c) of Occupational Safety and Health Act and section 405 of the Surface Transportation Assistance Act) that agency currently receives by far the largest number of private sector health and safety whistleblowing complaints;
>
> (iii) develop, in consultation with the agencies responsible for the substantive regulatory program, detailed written procedures that are as nearly uniform as the Secretary deems practicable for coordinating investigation, adjudication and follow-up in whistleblowing cases; and
>
> (iv) cause to be indexed and published all ALJ and Secretarial decisions in whistleblowing cases, including those rendered prior to January 1, 1987.

In addition to these changes, Congress and the Executive Branch may wish to address a number of related issues, such as the question of preemption. As was persuasively explained at the public hearing held by the Conference on October 1, 1986,125/ there is a considerable amount of whistleblowing litigation in the state and federal courts, resting not on federal whistleblowing protections, but on state law doctrines such as the public policy exception to the employment-at-will doctrine.126/ State law doctrines are evolving rapidly in this area, and it would be premature to consider legislation preempting state causes of action for retaliation that could be adjudicated in a federal forum. Given the current doctrinal ferment, this is an area which in the words of Justice Brandeis in New State Ice Co. v. Liebmann come to mind:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.127/

Or, as the First Circuit recently put it in a different context, "[t]he cutting edge of reform should be left to uncoerced community initiatives."128/

For the moment at least, and mindful of the approach the Conference took in Recommendation No. 84-5, the author recommends that States be permitted to continue to pursue their own courses of legal development. That process, so deeply rooted in our federal system, should not lightly be derailed, particularly at a time when all federal programs are under increasing scrutiny to prevent inappropriate intrusion on areas traditionally of concern to the states.

Another issue--which is potentially freighted with political-considerations--is the question of reassigning the responsibility for adjudication of safety-based whistleblowing retaliation complaints. The processes that led to the creation of an independent Mine Safety and Health Review Commission with responsibility for such cases and the creation of an independent Occupational Safety and Health Review Commission without such responsibility probably are of such a nature that recommendations for change will be of little utility absent a definite consensus among the interested constituencies.

In the circumstances, the Conference may conclude that it would be best advised to confine its recommendations to more structural or adjectival matters such as the enactment of uniform standards for protected conduct, adjudicatory procedures and remedies, strengthening the hearing process through judicially-enforceable subpoenas, and rationalization of the arrangements for judicial review.129/ That said, however, it would certainly seem that broader coverage of employees in industries with health and safety impacts is in order, and that all private sector health and safety federal whistleblowing protections ought to be administered by a single adjudicatory agency in the interest of fostering like treatment of like cases and maximizing the development of adjudicative expertise in employee protection matters.

Based on this study, there is reason for concern on several fronts, aside from the overall need to restructure, extend and rationalize the federal government's protection of health and safety whistleblowers in the private sector. The data indicate that in many cases it takes far longer than Congress contemplated to investigate and adjudicate whistleblowers' claims. Such delays, which may reflect resource problems, can also arise where the parties and ALJ conclude that more time is needed to do a proper job. Where the parties do not so agree, however, the delay may deter some complainants. Delay may ill serve employer interests as well. In addition, the study suggests a need for greater interagency coordination. Consolidation of adjudicatory functions is an important step towards the solution of that problem, but so long as numerous program agencies have an interest in the subject, the need for improved coordination will be substantial. The Department of Labor may want to consider addressing this problem by developing a program for regular interagency coordination of policies with regard to the protection of whistleblowers, with the result a multi-agency omnibus Memorandum of Understanding and an established interagency coordinating body to encourage communication and interaction among the agencies and responsible staff.

Finally, although nothing in this study should be understood as intimating an opinion on whether justice was done in any particular whistleblowing case, it is concluded that (1) 30-day statutes of limitations are unreasonable, (2) judicially-enforceable subpeonas are essential to the conduct of effective whistleblowing adjudications, and (3) it offends basic notions of fairness that under section 11(c) of the occupational Safety and Health Act or section 211 of the Asbestos Hazard Emergency Response Act victims of retaliation have no access to the federal courts if their cases are not pursued by the Department of Labor.

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2 In this report the term is also used to cover, where appropriate, employee refusals to work based on safety concerns. Such refusals are conceptually distinct from the core notion of whistleblowing identified in the text. They have, however, been treated as one as often as not and are included in this study. They are further addressed below under the heading of "Protected Conduct."

3 Other federal laws protect private sector whitleblowers in non-health and safety contexts. A recent example is section 3 of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, which amended 31 U.S.C. § 3730 (1982). In addition, numerous statutes prohibit retaliation against persons who complain of discrimination. *E.g.,* Title VII, 42 U.S.C. § 2000(e)-3(a) (1982); Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (1982). Because they do not relate to health and safety programs, these provisions are beyond the scope of the present study. Programs applicable to federal employees are also beyond the scope of this study although they are noted below and applicable legislation is identified in Table 2.

4 *See, e.g.*, S. 2516, 99th Cong. 2d Sess. (1986) (generic protection for employees of government contractors).

5 Two excellent works that attempt a comprehensive view of federal protection of private sector whistleblowers are L. Larson & P. Borowski, *Unjust Dismissal* (1986 & Cum. Supp. Sept. 1986), and S. Kohn; *Protecting Environmental and Nuclear Whitleblowers: A Litigation Manual* (Gov't Accountability Project 1985).

6 The Supreme Court recently held that temporary reinstatement of a complainant prior to a full evidentiary hearing does not violate the employer's due process rights as long as certain preliminary procedures are available, and a full post-reinstatement hearing is expeditiously held. *Brock v. Roadway Express, Inc.*, No. 85-1530 (U.S. Apr. 22, 1987.) MSHRC regulations comply with this standard. 51 Fed. Reg. 16022 (Apr. 30, 1986).

7 For earlier recommendations for omnibus legislation see Abbot, *Remedies for Employees Discharged for Reporting an Employer's Violation of Federal Law*, 42 Wash. & Lee L. Rev. 1383, 1400 (1985); Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 Alb. L. Rev. 466, 513-24 (1983).

8 *United States v. New York Telephone Co.*, 434 U.S. 159, 175 n.24 (1977).

9 Congress could, for example, pass a law making it a crime to interfere with or discourage whistleblowing in areas of activity that fall within the federal government's sphere. The Ku Klux Klan Act, 18 U.S.C. § 241 (1982), the literal terms of which might cover such misconduct, has been given a narrow application, and there is no record of it having been used in this fashion.

10 *See, e.g.*, 18 U.S.C. § 3059 (1982).

11 19 U.S.C. § 507 (1982), *as amended by* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 3152. Some states also have laws making it a crime not to aid a policeman in an emergency. *See* Wash. Post, Nov. 11, 1972, at A7, col. 1 (N.C.).

12 Another disincentive removal would be to debar government contractors who retaliate against whistleblowers. This was proposed in the case of the Morton Thiokol engineers referred to above, *see* H.J.R. 634, 99th Cong., 2d Sess. (1986), but the matter died in committee. One of the engineers has sued the company and asserted an FTCA claim against NASA. *Boisjoly v. Morton Thiokol Inc.*, Civil No. 87-194 (D.D.C. filed Jan. 28, 1987), *noted in* N.Y. Times, Jan. 29, 1987, at A16, col. 1.

13 *E.g.*, 29 C.F.R. § 24.1(a) (1986).

14 33 U.S.C. § 1367(e)(1982); 40 C.F.R. Pt. 108 (1986). *See also* 24 U.S.C. § 9610(e)(1982)(CERCLA); 42 U.S.C. § 6971 (e) (1982)(SWDA).

15 *See* 14 C.F.R. Pt. 314 (1986); 29 C.F.R. Pt. 220 (1986).

16 *See* Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, § 211.

17 The growth of interest in the whistleblowing area is eloquently attested by the fact that scholarly writers now no longer feel a need to set out the history. *E.g.*, Jenkins, *Federal*

Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy, 47 Alb. L. Rev. 466, 467 & n.11 (1983); Bouffard, Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine, 38 Me. L. Rev. 67, 70 n.6 (1986).

18 Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118, 126-27 (1976).

19 See generally L. Larson & P. Borowski, supra, § 2.04 et seq.

20 For a summary of federal common law developments in the wrongful discharge area see L. Larson & P. Borowski, supra, § 11.04.

21 The best single catalogue of the federal statutes appears in L. Larson & P. Borowski, supra, § 11.02-.03. Also very thoughtful are the articles by William R. Jenkins, cited supra, and Kohn & Kohn, An Overview of Federal and State Whistleblower Protections, 4 Antioch L.J. 99 (1986). Federal regulations also require state OSHA plans to include employee protection provisions. 29 C.F.R. § 1902.4(c)(2)(v) (1986).

22 Abbreviations appear in Table 10; citations to statutes and implementing regulations appear in Table 9.

23 Pub. L. No. 99-661, § 942(a)(1), adding 10 U.S.C. § 2409(a).

24 Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (1982), stands on a somewhat different footing from the other statutes. It creates no remedy for retaliation, but rather prevents an employer from invoking a collective bargaining agreement's no-strike clause where one or more employees quits work "in good faith because of abnormally dangerous conditions."

25 See, e.g., Murphy v. Consolidation Coal Co., No. 83-ERA-4 (DOL Jan. 17, 1985) (approving settlement under TSCA); Murphy v. Consolidation Coal Co., No CH3-1-D (DOI Jan. 14, 1985) (dismissing SMCRA case upon settlement).

26 Glazer & Glazer, The Whistle-Blower's Plight, N.Y. Times, Aug. 13, 1986, at A23, col. 1.

27 Kleinfeld, The Whistle Blowers' Morning After, N.Y. Times, Nov. 9, 1986, § 3, at 1, cols. 2,4 (noting conclusion of Glazer research). "But that doesn't mean they always are reduced to dire poverty and icy isolation. Often, they are reincarnated in some new position." Id.

28 Bauch v. Landers and State of Florida Dep't of Environmental Regulation, Dkt. No. 79-SDWA-1 (OALJ). See also, e.g., Chase v.

Buncombe County, N.C., Dep't of Community Improvement, Dkt. No. 85-SWD-4 (Solid Waste Disposal Act; county landfill employee). In contrast, a state employee was held not protected under the Surface Mining Control and Reclamation Act on the theory that the state is not a person within the meaning of § 703 of that Act. *Leber v. Pa. Dept. of Environmental Resources*, 780 F.2d 372 (3d Cir.), *cert. denied*, 106 S.Ct. 3294 (1986).

29 *E.g.*, *McAllen v. EPA*, Dkt. No. 86-WPC-1 (OALJ Nov. 28, 1986); *Conley v. McClellan Air Force Base*, Dkt. No. 84.-WPC-1 (OALJ Sept. 12, 1984); *McGough v. U.S. Navy*, Dkt. No 86-ERA-18 (OALJ Aug. 19, 1986), slip op. at 3 n.3 (dictum). *But see Wensil v. B.F. Shaw Co.*, Dkt. No. 86-ERA-15 (OALJ July 8, 1986) (DOE contractor employees at plant not licensed by NRC *held* not protected, despite plain meaning of statute); Wash. Post, Jan. 8, 1987, A17, col. 1, at A18, col. 1 (noting pendency of *Wensil* jurisdictional issue regarding Savannah River DOE plant).

30 *E.g.*, *George v. Aztec Rental Center, Inc.*, 763 F.2d 184 (5th Cir. 1985); *Holmes v. Schneider Power Corp.*, 628 F.Supp. 937 (W.D. Pa. 1986); L. Larson & P. Borowski, *supra*, § 11.03 [20], at 11-38. This applies to conventional whistleblowing; in refusal- to-work situations, the employee can seek mandamus to require the Secretary to enforce the statute. 29 U.S.C. § 662(d) (1982).

31 *See also* Schibley, *The Employment-at-Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety*, 16 U. Mich. J.L. Reform 435, 439-40 (1983) (noting deficiencies in DOL personnel and resources); B. Mintz, *OSHA History, Law, and Policy* 342 (1984).

32 *But see* 73 U.S. Dep't of Labor Ann. Rep. for FY85 121 (1986) (reference to "substantial increase" in § 11(c) cases, among others).

33 Solomon & Garcia, *Protecting the Corporate Whistle Blower Under Federal Anti-Retaliation Statutes*, 5 J. Corp. L. 275, 283 (1980).

34 1984 OSHA Ann. Rep. 56 (1985).

35 *Id*.

36 Teamsters for a Democratic Union, *Convoy Dispatch*, No. 59, at 3, col. 3 (Feb. 1986).

37 *Id*.

38 In FY85 and FY86, the full MSHRC decided 11 cases of safety complaints or refusals to work. Three cases involved both kinds of discrimination, 5 involved only safety or health complaints,

and 3 involved only a refusal to work. Letter from L. Joseph Ferrara, General Counsel, MSHRC, to the author, Oct. 31, 1986.

39 Testimony of Hon. Nahum Litt, Chief Judge, OALJ, Tr. 45-46.

40 See Letter from James Y. Callear, Freedom of Information Officer, NLRB, to the author, Sept. 4, 1986. For example, in 1985, the Board decided 8 cases involving safety-based refusals to work.

41 Off. of Special Counsel Ann. Rep. for FY85 15 (1985).

42 See Paul v. FMSHRC, No. 85-1801 (D.C. Cir. Feb. 27, 1987) (mining engineer held not a miner). Another controversial issue of coverage involves the application of environmental whistleblower provisions to prison inmates. See Wash. Post, Feb. 12, 1987, at A25, col. 3 (noting OALJ ruling that federal inmate is protected by Clean Air Act antiretaliation section).

43 See, e.g., Department of Energy Order No. 5483.1A; In re Mestres, Department of Energy Spec. App. Bd. (Dec. 27, 1984), noted in Wash. Post, Jan. 29, 1985, at A17, col. 1. Protection may also be afforded under contractual provisions. See Testimony of James E. Jensen, Tr. 107 (TVA).

44 132 Cong. Rec. H2710 (daily ed. May 14, 1986). Rep. Markey proposed debarring the employer.

45 Pub. L. No. 99-661, § 942, ____ Stat. ____, adding 10 U.S.C. § 2409.

46 See N.Y. Times, Sept. 21, 1986, at 1, col. 1 and 36, col. 2 (claim of discharge in retaliation for refusing to sign report that omitted details on flaws in new Army troop carrier).

47 Federal Government Contractors Personnel Protection Act of 1986, S. 2516, 99th Cong., 2d Sess. (1986). S. 2516 would have created a federal cause of action, enforceable by the individual in district court, for any reprisal against an officer or employee of a government contractor for disclosing to an agency information the individual "reasonably believes indicates . . . a substantial and specific danger to public health or safety." The agency head would also have been empowered to impose civil penalties of up to $500,000 per reprisal, subject to an on-the-record APA hearing with judicial review in district court.

48 Letter from John F. Sherman, III, Assistant Gen'l Counsel, New England Power Service Co., to the author, Dec. 15, 1986.

49 In one case, quoted in S. Kohn, supra, at 28, the Labor Department found that disclosures to news media were also protected under the WPCA. See also Kohn & Carpenter, Nuclear Whistleblowing Protection and the Scope of Protected Activity under Section 210 of the Energy Reorganization Act, 4 Antioch Ln.73, 86-89 (1986).

50 *Compare* *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), *with* *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert*. *denied*, 92 L. Ed.2d 724 (1986), *and* *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159 (9th Cir. 1984). *See* *also* *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502, 485 N.E.2d 372, *cert*. *denied*, 90 L.Ed.2d 187 (1986).

51 S. Kohn, *supra*, at 28-29 (collecting cases).

52 *Meyers Industries, Inc.*, 281 NLRB No. 118, at 19 (Sept. 30, 1986), *pet. for review filed sub nom.* *Prill v. NLRB*, No. 86-1675 (D.C. Cir. Dec. 11, 1986). *See* *generally* Fasman, *Labor Board Adopts Conservative View on Employee Rights*, Legal Times, Nov. 10, 1986, at 12.

53 The Supreme Court has recognized that "parties may have a choice of federal remedies," *Connell Construction Co. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616, 635 n.17 (1975), but one wonders whether dual federal remedies are necessary in the whistleblowing area. If federal whistleblowing legislation were reorganized as recommended *infra*, there would be less need to be concerned about limitations on the gloss applied to the NLRA, and no need for two federal agencies to address a single issue.

54 *Id*. *Meyers Industries*, *supra*, at 19.

55 *Prill v. NLRB*, No. 86-1675 (D.C. Cir. filed Dec. 11, 1986).

56 *See* Table 3 *infra*. While the statute is silent, the Secretary of Labor has construed the ERA to protect good faith reasonable refusals to work, *Pensyl v. Catalitic Inc.*, No. 83-ERA-2 (SOL Jan. 13, 1984), on the theory that the ERA and FMSHA are *in* *pari materia*. Slip op. at 5.

57 *See* *generally* Nothstein, *Employee Refusals to Work*, Labor (Fall 1982).

58 *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

59 *Meyers Industries, Inc.*, *supra*, at 20.

60 29 U.S.C. § 143 (1982).

61 29 C.F.R. § 1977.12(b)(2) (1986).

62 445 U.S. 1 (1980).

63 *E.g.*, *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974) (requiring subjective good faith and objective

reasonableness under LMRA). FMSHA § 815(c) has been held to apply refusals to work based on a reasonable, good faith belief that the safety of another employee will be endangered. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364 (4th Cir. 1986).

64 Compare Richter v. Baldwin Associates, No. 84-ERA-09/10/11/12 (SOL Mar. 12, 1986) (pro se complaint, detailed pleading not required), with Testimony of Mozart G. Ratner, Tr. 100-01.

65 The FLSA is not listed on the chart because, although the child labor provisions of that legislation have a health and safety component, retaliation cases under those provisions are virtually unheard of.

66 Tr. 40-41, 73; GAP-TLPI Testimony at 11.

67 Letter from Julie Fosbinder, Teamsters for a Democratic Union, to Jeffrey S. Lubbers, Dec. 1, 1986 (referring to Bureau of Motor Carrier Safety, Dep't of Transportation.)

68 See Energy Reorganization Act of 1974, § 2(c), Pub. L. No. 93-438, 88 Stat. 1233.

69 Under DoD87, investigations are done by the IG, thus providing a measure of independence from the procurement agency. On the other hand, the IG's report simply goes to the Secretary, who naturally has ultimate responsibility for procurement.

70 See Table 7 infra.

71 See 29 C.F.R. § 18.12 (1986) (amici restricted to filing briefs).

72 10 C.F.R. § 50.7(c) (1986).

73 The NRC has also taken this step. 10 C.F.R. § 50.7(e) (1986). The Wage and Hour Division has imposed other notice-posting requirements by regulation. E.g., 29 C.F.R. § 500.76(d)(1) (1986) (MSAWPA). See also id. § 516.4 (FLSA); id. § 1903.2(a) (OSHA); 42 U.S.C. § 2000e-10 (1982)(EEOC).

74 Testimony of Kennedy P. Richardson, Tr. 57-60; See also Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Dec. 2, 1986 suggesting, in the alternative, that the 30-day limit for WHD investigations be precatory).

75 Cf. 42 U.S.C. § 2000e-5(f)(1)(1982) (aggrieved person may institute civil action if EEOC dismisses complaint or fails to sue within 180 days of filing of charges.)

76 Testimony of Stephen M. Kohn, Tr. 84. But see Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Dec. 2, 1986 at 2-3: "The hypothesis that the Wage and Hour Division is necessary to induce private attorneys to prosecute Section 210 cases is refuted by the fact that no such inducement has ever been necessary for common law wrongful discharge claims and the fact that section 210 authorizes the administrative law judge to award attorney's fees which may well exceed what the attorney would otherwise receive under a typical contingent fee agreement. Nor is the Wage and Hour Division investigation necessary to 'screen out' frivolous cases since most private attorneys will decline to undertake cases with no plausible merit."

77 See Testimony of Sen. Charles E. Grassley, Tr. 14. 29 C.F.R. § 516.4 (1986). Another approach might be to encourage or require professionals such as engineers to avail themselves of professional societies' safety committees when ethical issues arise. Unfortunately, these mechanisms are not well known. See Lindorff, Engineers' Duty to Speak Out, The Nation, June 28, 1986, at 880. In addition, employees often do not have the luxury of being able to formulate a request for an opinion, and committees such as these lack the tools to find needed facts on issues that are often hotly contested.

78 See generally Wargo, Tracking Employee Concerns, 32 Nucl. Ind. No. 1, 3 (Jan. 1985).

79 Durham v. Butler Service Group. No. 86-ERA-9 (OALJ 1986), discussed in Safety Concerns Programs Challenged by Intervenors, 33 Nnd. Ind. No. 6, 16-17 (June 1986). Access to documents obtained under the SAFETEAM program marketed by a subsidiary of the Detroit Edison Co., see generally Heffner, Limiting Risk: Improving Public Perception of Nuclear Plant Safety Through SAFETEAM (remarks at American Nuclear Society Annual Meeting, Nov. 12, 1985), was permitted, subject to a protective order, in Texas Util. Elec. Co (Comanche Peak Stream Elec. Station, Units 1 & 2), Dkt. Nos. 50-445 to 446 (A.S.L.B. Dec. 23, 1985).

80 See Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Dec. 2, 1986, at 2.

81 Id.

82 Applicable procedural regulations appear in 29 C.F.R. Pt. 24 (1986). See generally S. Kohn, supra, chs. 1, 5-6, 8-9.

83 See 5 U.S.C. § 557(c) (1982); 24 C.F.R. § 24.6 (1986).

84 Testimony of Stephen M. Kohn, Tr. 70-71.

85 See 73 U.S. Dep't of Labor Ann. Rep. for FY85 174 (1986) (noting survey performed by IG). As of October 1, 1986, that office reports to the Undersecretary rather than the Solicitor of Labor. Testimony of Judith E. Kramer, Tr. 21.

86 Letter from Mozart G. Ratner to Jeffrey S. Lubbers, Dec. 10, 1986, at 2. The suggestion for an appellate panel appears to contemplate that the panel's jurisdiction would be nondiscretionary and that its decisions would not be subject to further review by the Secretary of Labor. An alternative might be to have a panel to hear argument on behalf of the Secretary, as was formerly done in connection with merchant marine disciplinary proceedings. See Fidell, Improving Competence in the Merchant Marine: Suspension and Revocation Proceedings 45 Mo. L. Rev. 1, 23 at n.151 (1980).

87 OSHA Inst. CPL 2.45A, ¶ 6 (Mar. 8, 1984).

88 S. Kohn, supra, at 174, citing Taylor v. Brighton Corp., 616 F.2d 256, 258 (6th Cir. 1980).

89 30 U.S.C. § 815(c)(2) (1982); T. Means, Discrimination and Miners' Rights Under the Federal Mine Safety and Health Act of 1977 21 & n.105 (1984).

90 Wage & Hour Div., Field Operation Handbook § 52x03(e).

91 29 C.F.R. §§ 1978.107-.108, 51 Fed. Reg. 42093-94 (1986).

92 E.g., 15 U.S.C. § 2622(b)(2)(A)(1982)(TSCA); 42 U.S.C § 5851(b)(2)(A)(1982)(ERA); 42 U.S.C. § 7622(b)(2)(A)(1982)(CAA); 42 U.S.C. § 300J-9(i)(2)(B)(i)(1982)(SDWA); see also 29 C.F.R. § 24.6(b)(1) (1986).

93 Compare S. Kohn, supra, at 3 & n.15, and Letter from Julie Fosbinder, Teamsters for a Democratic Union, to Jeffrey S. Lubbers, Dec. 1, 1986, at 2 (noting delays of up to 600 days in processing STAA complaints), with Brief for Appellants at 49 n.26, Brock v. Roadway Express, Inc., No. 85-1530 (U.S.) (suggesting that prolonged delay in secretarial decision is not typical under STAA), and U.S. Dep't of Labor, Off. of Administrative Law Judges, Summary of "Traditional" Labor Cases Adjudicated by the Office of Administrative Law Judges 56-57 (1984) (postponements granted only for compelling reasons; time constraints in whistleblower cases "uniquely restrictive"). In one case arising under the ERA, it took the Wage and Hour Division over eight months to conclude that the 30-day statute of limitations barred the complaint. Rose v. Sec'y of Labor, 63 Ad.L.2d 889, 892 (6th Cir. 1986) (Edwards, J., concurring). DOL regulations call for the investigation to be completed in 30 days.

94 These periods are treated as directory, *i.e.*, precatory. *See, e.g.*, 29 C.F.R. § 1978.114, 51 Fed. Reg. 42095 (1986)

95 GAP-TLPI Testimony at 4-6; Testimony of Stephen M. Kohn, Tr. 71-72.

96 GAP-TLPI Testimony at 4 & 6 n.13; Galen, *An Ethical Furor Over a Witness*, Nat'l L.J., Dec. 22, 1986, at 3.

97 Tr. 84-86; *see also id.* at 97 (testimony of Mozart G. Ratner, dubitante).

98 29 C.F.R. § 24.5(e)(4)(1986).

99 *E.g.*, Atomic Energy Act §§ 161(c), 233, 42 U.S.C. § 2201(c), 2281 (1982); *see generally* 3 B. Mezines, J. Stein, & J. Gruff, *Administrative Law* § 21.02 (G. Mitchell rev. 1985); 1 K. Davis, *Administrative Law Treatise* § 4.6 (2d ed. 1978); Fed. R. Civ. P. 81(a)(3).

100 *See Industrial Union Dep't v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

101 *Id.* at 1339.

102 *E.g.*, *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1064 (6th Cir. 1982).

103 *See*, *e.g.*, *Hasan v. Nuclear Power Services, Inc.*, No. 86-ERA-2 (OALJ Sept. 25, 1986) (disqualifying counsel).

104 *See* S. Kohn, *supra*, at 61-62 (collecting cases).

105 *DeFord v. TVA*, No. 81-ERA-1 (DOL Apr. 30, 1984), *following remand from DeFord v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983).

106 *English v. General Elec. Co.*, No. 85-ERA-2 (ALJ Aug. 1, 1985), *noted in* N.Y. Times, Aug. 4, 1985, at 23, cols. 1, 6.

107 *See* Table 6 *infra*; *Landers v. Commonwealth-Lord Joint Venture*, 83-ERA-5, ALJ op. at 17 (1983), *noted in* S. Kohn, *supra*, at 64 & n.18. Under several of the statutes, exemplary damages may be awarded if a civil action is brought to secure compliance with the Secretary's order. *See* 15 U.S.C. § 2622(d)(1982)(TSCA); 42 U.S.C. § 300J-9(i)(4)(1982)(SDWA); 42 U.S.C. § 5851(d)(1982)(ERA); 42 U.S.C. § 7622(d)(1982)(CAA).

108 *Brock v. Roadway Express, Inc.*, No. 85-1530 (U.S.) (pending); *see also Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985).

109 See 10 C.F.R. § 50.7(c) (1986).

110 Letter from A.B. Beach, Dep. Dir., Enforcement Staff, Off. Of Inspection of Enforcement, NRC, to Jeffrey S. Lubbers, Dec. 10, 1986.

111 See, e.g., Leber v. Pa. Dept. of Environmental Resources, 780 F.2d 372 (3d Cir.), cert. denied, 106 S.Ct. 3294 (1986).

112 The fact that a § 11(c) case must be brought by the government who harms employees by rendering inapplicable any statute of limitations. See, e.g., Marshall v. Intermountain Elec. Co., 614 F.2d 260 (10th Cir. 1980).

113 The belief that nothing will be done to correct the problem a whistleblower discloses tends to discourage whistleblowing. Testimony of Sen. Charles E. Grassley, Tr. 12; MSPB, Whistleblowing and the Federal Employee 27-31 (1981), cited in Martin, The Whistleblower Revisited, 8 Geo. Mason L. Rev. 123 (1985).

114 47 Fed. Reg. 54585 (1982), discussed in Kansas City Gas & Elec. Co. v. Brock, 780 F2d 1505, 1509-10 (1th Cir. 1985), cert. denied, 92 L.Ed.2d 724 (1986). See also 29 C.F.R. § 24.4(a) (1986) (program agency to receive copy of all complaints).

115 GAP-TLPI Testimony at 10-11, discussing Ryan v. Brock, No. 86-4058 (2d Cir. 1986) (ordering DOL to reopen ERA case on basis of NRC report).

116 See 40 Fed. Reg. 26083 (1975), reproduced in OSHA Inst. Dis. 4A App. I, at I-2 (Aug. 25, 1985).

117 45 Fed. Reg. 6189 (1980).

118 Testimony of Stephen M. Kohn, Tr. 69-70.

119 See generally Letter from Anthony J. McMahon, Chief Counsel, Federal Highway Admin., to Marshall J. Breger, Chairman, Administrative Conference, Sept. 29, 1986.

120 In some instances, two remedial programs may work at cross purposes. For example, in Thomas v. TVA, No. SL07528610208 (MSPB May 9, 1986), an MSPB administrative law judge overturned the dismissal of a supervisor at a nuclear power plant who had been found by TVA to have discriminated against one of his supervisors. Although the supervisor had invoked the protection of the ERA, he did so after the statute of limitations had expired. TVA nonetheless took disciplinary action based on the

supervisor's allegations, and it was that action that the MSPB proceeding set aside.

121 *Cf.* N.Y. State-City Comm'n on Integrity in Government, *Report and Recommendations on Whistleblowing Protection in New York* 5 (Oct. 8, 1986) ("complainant should be entitled to be informed of the final disposition of his complaint").

122 Testimony of Stephen M. Kohn, Tr. 70.

123 Tr. 76.

124 *See generally* 5 U.S.C. §§ 555(b), 706(1)(1982) (agencies to conclude matters within reasonable time; reviewing courts empowered to compel agency action unreasonably withheld); *e.g.*, *Public Citizen v. Dep't of Health & Human Services*, 632 F. Supp. 220, 226 (D.D.C. 1986).

125 *See generally* Testimony of Anthony Z. Roisman, Tr. 76-83.

126 *See generally* Fidell, *Nuclear Whistleblowing Issues in 1985* (remarks at American Nuclear Society Annual Meeting, Nov. 12, 1985), at 6, *citing* *Lang v. Pacific Gas & Elec. Co.*, No. 60185 (San Luis Obispo Co., Cal., Super. Ct.), *on removal*, Civil No. 85-6191HLH (C.D. Cal.); *Hermann v. H.P. Foley Co.*, No. 59672 (San Luis Obispo Co., Cal., Super. Ct.), *on removal*, Civil No. 85-2246-RG (Bx) (C.D. Cal. May 20, 1985); *Stokes v. Bechtel Corp.*, Civil No. C-84-8038 (N.D. Cal.), and No. 830446 (San Francisco Co., Cal., Super. Ct.); *Parks v. Bechtel Corp.*, Civil No. C-84-8037-WHO (N.D. Cal.); *Raymond Kaiser Engineers v. Superior Court*, No. 8027975 (Cal. Dist. Ct. App. Aug. 23, 1984); *Berstler v. Hirsch*, Civil No. 83-6122 (E.D. Pa. July 10, 1983); *Atchison v. Brown & Root, Inc.*, No. 83-29889 (Harris Co., Tex., Dist. Ct.), *on removal*, Civil No. H85-3568 (S.D. Tex.). *Stokes* and *Parks* were remanded to the California courts. *Stokes v. Bechtel North American Power Corp.*, 614 F.Supp. 732, 735 n.1 (N.D. Cal. 1985).

127 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

128 *Anaya v. Hansen*, 781 F.2d 1, 7 & n.8 (1st Cir. 1986).

129 Before any recommendation is made with respect to the allocation of responsibility for judicial review, it is assumed that the Conference would secure the views of the Judicial Conference of the United States and the Federal Judicial Center.

Table 1. Private Sector Employee Protection Statutes
(Health & Safety)

Statute	Program Agency	Investigative Agency	Adjudicatory Agency	Statute of Limitations*	Judicial Review
AHERA	EPA	DOL	Dist Cts	90 days	N/A
CAA	EPA	WHD	OALJ	30 days	Ct Apps
CERCLA	EPA	WHD	OALJ	30 days	Dist Cts
DOD87	DOD	DOD	None in Act	None in Act	N/A
ERA	NRC	WHD	OALJ	30 days	Ct Apps
FMSHA	MSHA	MSHA	MSHRC	60 days	Ct Apps
FRSAA	DOT (FRA)	FRA	Nat'l R.R. Adjustment Bd	30 days	Dist Cts
ISCA	DOT (USCG)	DOL	Dist Cts	60 days	N/A
LMRA	NLRB	N/A	NLRB	6 mos	Ct Apps
MSAWPA	WHD	WHD	Dist Cts	180 days	N/A
NLRA	NLRB	NLRB (OGC)	NLRB	6 mos	Ct Apps
OSHA	OSHA	OSHA	Dist Cts	30 days	N/A
SDWA	EPA	WHD	OALJ	30 days	Ct Apps
SMCRA	DOI (OSMRE)	OSMRE	BLA	30 days	Dist Cts
STAA	DOT (FHWA)	OSHA	OALJ	180 days	Ct Apps
SWDA	EPA	WHD	OALJ	30 days	Ct Apps
TSCA	EPA	WHD	OALJ	30 days	Ct Apps
WPCA	EPA	WHD	OALJ	30 days	Ct Apps

* The limitation periods refer to the time for filing a complaint with the investigative agency, rather than for seeking judicial review.

Table 2. Public Sector Employee Protection Statutes (Health & Safety)

Statute	Program Agency	Investigative Agency	Adjudicatory Agency	Statute of Limitations	Judicial Review
ASHDCA	EDUC	None in Act	None in Act	None in Act	N/A
AHERA	EPA	DOL	Dist Cts	90 days	N/A
CSRA	OPM	OSC	MSPB	20 days	Fed Cir
DOD84	DOD	DOD IG + Components	OASD(A)	None in Act or regs	Dist Cts
EO12196	All (less military)	DOL	Program Agencies	None	N/A

Table 3. Protected Conduct

Statute	Whistleblowing	Reasonable Belief	Refusal to Work	Reasonable Belief
AHERA	Covered	Silent	Not Covered	N/A
ASHDCA	Covered	Silent	Not Covered	N/A
CAA	Covered	Silent	Not Covered	N/A
CERCLA	Covered	Silent	Not Covered	N/A
CSRA	Covered	Required	Not Covered	N/A
DOD84	Covered	Required	Not Covered	N/A
DOD87	Covered	Silent	Not Covered	N/A
EO12196	Covered	Silent	Not Covered	N/A
ERA	Covered	Silent	Covered*	Required*
FLSA	Covered	Silent	Not Covered	N/A
FMSHA	Covered	Silent**	Covered	Required
FRSAA	Covered	Silent	Covered	Required

ISCA	Covered	Silent	Not Covered	N/A
LMRA	N/A	N/A	Covered	Required***
MSAWPA	Covered	Required (just cause)	Not Covered	N/A
NLRA****			Covered	Subjective good faith
OSHA	Covered	Silent	Covered (reg)	Required
SDWA	Covered	Silent	Not Covered	N/A
SMCRA	Covered	Silent	Not Covered	N/A
STAA	Covered	Silent	Covered	Required
SWDA	Covered	Silent	Not Covered	N/A
TSCA	Covered	Silent	Not Covered	N/A
WPCA	Covered	Silent	Not Covered	N/A

* By interpretation. *Pensyl v. Catalytic, Inc.*, No. 83- ERA-2 (SOL Jan. 13, 1984).

** Safety complaints are protected even if frivolous. *Munsey v. FMSHRC*, 595 F.2d 735, 742-43 (D.C. Cir. 1978).

*** Subjective good faith and objective reasonableness are required. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

**** Concerted activities are protected under section 7 of the NLRA, but the circuits are split as to the application of this provision to individual workers' safety complaints. *See Ewing v. NLRB*, 768 F.2d 51 (2d Cir. 1985); *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, 106 S. Ct. 313 (1985); *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295 (5th Cir. 1984). On remand from *Prill*, the Board ruled that individuals' complaints are not protected. *Meyers Industries, Inc.*, 281 NLRB No. 118 (Sept. 30, 1986), *pet. for review filed sub nom.* *Prill v. NLRB*, No. 86-1675 (D.C. Cir. Dec. 11, 1986).

Table 4. Protected Conduct--Protected Disclosures

Statute	
AHERA	". . . provided information relating to a potential violation of this title to any other person, including a State or the Federal Government"
ASHDCA	". . . brought to the attention of the public. . ."
CAA	Commencing EPA proceeding, testifying or assisting
CERCLA	Providing information to a state or federal government, filing proceeding, testifying
CSRA	Any disclosure not specifically prohibited by law
DOD84	Any disclosure not specifically prohibited by law
DOD87	Disclosure to a Member of Congress or an authorized official of DoD or the Department of Justice
EO12196	". . . for filing report. . ." (presumably with agency by which employee is employed)
ERA	Reporting to NRC (circuits divided on complaint to employer), or participating in proceedings
FMSHA	Complaint to MSHA, operator or union, instituting or testifying in proceeding
FRSAA	Filing complaint, instituting proceeding, testifying
ISCA	Complaint to USCG
MSAWPA	Filing complaint, instituting proceeding, testifying
NLRA	Concerted activities
OSHA	Filing OSHA complaint, instituting proceeding, or testifying; construed to include complaints to other federal, state or local agencies, employers, unions or the media
SDWA	Commencing proceeding, testifying or assisting
SMCRA	Reporting to DOI, state regulatory authority, employer or his representative, or participating in adjudicatory or rulemaking proceedings
STAA	Filing complaint, instituting proceeding, testifying

SWDA	Filing or instituting proceeding or testifying
TSCA	Filing complaint, instituting proceeding, testifying
WPCA	Filing complaint, instituting proceeding, testifying

Table 5. Exhaustion of Employer Remedies

Statute	
AHERA	Not required
ASHDCA	Not required
CAA	Not required
CERCLA	Not required
CSRA	Not required
DOD84	Not required
DOD87	Not required
EO12196	Not required
ERA	Not required
FMSHA	Not required, but encouraged by MSHRC. *E.g.*, *Sec'y ex rel. Hogan & Ventura v. Emerald Mines Corp.*, 8 FMSHRC 1066 (1986), *quoting* *Sec'y ex rel. Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (1982).
FRSAA	Apparently required (45 U.S.C. secs. 153, 441(c) (1982))
ISCA	Not required
MSAWPA	Not required
NLRA	Not required by statute. Refer to collective bargaining agreements
OSHA	DOL encourages use of alternative remedies (29 C.F.R. sec. 1977.18 (1986)); employee must attempt to obtain corrective action from employer in refusal-to-work cases (*Whirlpool Corp. v. Marshall*, 445 U.S.

	1, 10-11 (1980))
SDWA	Not required
SMCRA	Not required
STAA	Required for refusals-to-work. DOL encourages use of alternative remedies. 29 C.F.R. sec. 1978.112, 51 Fed. Reg. 42095 (1986).
SWDA	Not required
TSCA	Not required
WPCA	Not required

Table 6. Remedies

Statute	Exemplary Damages	Temporary Reinstatement
AHERA	Statute silent	
ASHDCA	Statute silent	
CAA	Held to be unavailable by DOL	
CERCLA	Statute silent	
CSRA	Statute silent	
DOD84	Statute silent	
DOD87	Statute silent	
EO12196	EO silent	
ERA	Held to be unavailable by DOL	
FMSHA	Statute silent	Regulation provides for temporary reinstatement after preliminary hearing
FRSAA	Statute silent	
ISCA	Statute silent	
MSAWPA	Statute silent	
NLRA	Statute silent	

OSHA	Statute silent
SDWA	Exemplary damages authorized
SMCRA	Statute silent; possibly authorized by regulation (43 C.F.R. sec. 4.1204 (1986))
STAA	Statute silent *
SWDA	Held to be unavailable by DOL
TSCA	Exemplary damages authorized
WPCA	Held to be unavailable by DOL

* *See* *Brock v. Roadway Express, Inc.*, No. 85-1530 (U.S. Apr. 22, 1987) (temporary reinstatement after preliminary hearing does not violate due process).

Table 7. *Caseload*, FY1985

Statute	Complaints Received	Complaints Found Meritorious	Cases Docketed by OALJ	Agency Hearings	Judicial Review Commenced
AHERA	N/A	N/A	N/A	N/A	N/A
ASHDCA				N/A	
CAA			3	1	
CERCLA				0	
ERA			44	11	2
FMSHA	276*	97**		53	3
FRSAA	0	0		0	0
ISCA				N/A	
MSAWPA				N/A	
OSHA	2433	291		N/A	67***
SDWA			0	0	
SMCRA	1			0	1

STAA	248	20	6	4
SWDA		4	1	
TSCA		3	1	
WPCA		3	2	

* Of these, 102 complaints were docketed with FMSHRC.

** Decided by FMSHRC ALJs.

*** Cases sent to Solicitor of Labor for possible district court action. Perhaps half are pursued; some of those are settled.

Table 8. Whistleblower Case Chart

This chart was compiled from records available at the Office of Administrative Law Judges of the Department of Labor as of June 30, 1986. The left side of the chart indicates the disposition of each case. The following abbreviations apply:

Dism = dismissal
Sett/Withd = settlement or withdrawal of complaint
Untime = untimely filing of complaint
Disc Eq T = Discussion of equitable tolling of statute of limitations by ALJ
Grant Eq T = ALJ held statute to be equitably tolled
Judg Compl = judgment for employee
Reinstat = complainant ordered reinstated
Back Pay = back pay awarded ($ amount shown where revealed by record)
Atty Fees = attorneys fees awarded
Aff Relief = affirmative relief awarded
Misc Relief = miscellaneous relief ordered

Secretarial modifications of ALJ rulings are noted.

The right side of the chart shows the time elapsed for each phase of the case. The first column shows the number of days from the employer's action to the filing of the complaint. Succeeding columns indicate days elapsed between filing of the complaint and WHD's decision, ALJ hearing (if any), motion for summary disposition (if granted), ALJ decision, and secretarial decision. Where information was unavailable, a blank appears. Where a case was decided after hearing, but the hearing date is unknown, an "x" appears.

The final two columns show which cases were reviewed by the courts of appeals or enforced by the district courts.

Case No.	Dism.	Sett/ Withd.	Un- time	Disc. Eq.T.	Grant Eq.T.	Judg. Compl.	Rein- stat.	Back Pay	Atty. Fees	Aff. Relief	Misc Relief	Compl. filed	Wage&Hour Decision	Hearing	Motion for Summ. Disp.	A.L.J. Decision	Sect.of L. Decision	Review by Ct. Apps.	Enforcement by Dist. Ct
84-CAA-1	x	x										–							
85-CAA-1	x												26[10]		111	187			
85-CAA-2	x	x										–	–	–		–	–		
78-SDWA-1	x		x	x															
79-SDWA-1	x											29		92		213	240		
79-SDWA-2	x		x									100		66		94	132		
79-SDWA-2[1]	x											5		–			–		
80-SDWA-1	x											16		99		147			
80-SDWA-2	x											42	26	72		90			
83-SDW-1	x											28		73		250	746		
81-SWDA-1						x	x	x	6429.50					x					
85-SWD-1	x	x											38[11]	90		106	200		
85-SWD-3	x											–	–	–		–	–		
85-SWD-4	x											29	6	–	34	46			
79-TSCA-1	x[2]		x	x								54		105		266	395	(SOL upheld)	
79-TSCA-1[3]	x[4]						[5]	[6]	x[7]			11		66		227	356	x	
81-TSCA-1	x											8	42	x		141	174		
83-TSCA-1	x													81[12]		111			
84-TSC-1	x													–	101	133			
84-TSC-2	x	x										–	–	–		–	–		
85-TSC-3	x		x	x								443	5	128		172			
86-TSC-1	x	x										–	–	–		–	–		
WPCA-2	x													x		366	430		
WPCA-3	x		x	x								395		–	x	1049	1147		
80-WPCA-1						x	8	x			Cleared Pers. file	28		159		258	275		
81-WPCA-1	x											28		104		128			
81-WPC-2	x	x										–	–	x		–	–		
83-WPC-1	x	x										–	–	x		–	–		
83-WPC-2						x	9	24,771	9092.27		Cleared Pers. file	23	28	76		110			
84-WPC-1	x											1		85		126			
84-WPC-2	x		x									189	144	680		799			
85-WPC-1	x	x										–	–	–		–	–		
85-WPC-2	x													70[13]		126			
85-WPC-3						x	x	x	x				57[14]	124		254	261		
79-ERA-1						x	x	x	2500.00		Cleared Pers. file	5		138		205	240		

Case No.		Dism.	Sett/ Withd.	Un-time	Disc Eq.T	Grant Eq.T	Judg. Compl.	Rein-stat.	Back Pay	Atty. Fees	Aff. Relief	Misc. Relief	Compl. filed	Wage&Hour Decision	Hearing	Motion for Summ. Disp.	A.L.J. Decision	Sect. of L. Decision	Review by Ct. Apps.	Enforcement by Dist. Ct
79-ERA-3	1	x											15		211		241			
80-ERA-1	2	x											21		111		149	202		
80-ERA-2	3	x		x	x	x							32		59		95	148		
81-ERA-1	4						x	x	x	11,587.02		50,000 Reputation, etc[15]	30	59	x		119	175	x[20]	
81-ERA-2	5																			
81-ERA-3	6	(Decision not Found)																		
81-ERA-4	7	x													x		156[21]	184		
81-ERA-5	8	x											29	25	122		175	213	x	
81-ERA-6	9						x	x	x						73[22]		129	250	x	
81-ERA-7	10	x											21		x		253	5 yrs.		
81-ERA-8	11	x	x																	
81-ERA-9	12	x	x																	
82-ERA-1	13	x												9[23]	x		77			
82-ERA-2	14						x[16]						15[24]		126		209	531		
82-ERA-3	15						x	x	x			5,000 pain, sufferring[17]		38[25]	72		108	267		
82-ERA-4	16	(See 83-ERA-4)					x	x	x				15	26	217		245			
82-ERA-5	17	x																		
82-ERA-6	18	x	x																	
82-ERA-7	19	x													x					
82-ERA-8	20	x												29[26]	74		188		x	
82-ERA-9	21						x	x[18]	x	[illegible],875.50		Clear Pers. File							x[27]	
82-ERA-10	22	x	x																	
82-ERA-11	23	x		x	x	x							64	30	277		293			
82-ERA-13	24	x	x																	
83-ERA-2	25	x[19]												68[28]	x		291	469[29]		
83-ERA-3	26	x													40		66	2 1/2yrs.		
83-ERA-4	27	(Remedy for 82-ERA-4)						x	x	8,600.00										
83-ERA-6	28	x	x																	
83-ERA-7	29	x											36		x		90	19mos.		
83-ERA-8	30	x	x																	
83-ERA-9	31	x											21	40	x		266	20mos.		
83-ERA-10	32	x	x																	
83-ERA-11	33	x	x																	
83-ERA-12	34						x	x	x	20,221.63	Post copy of order	Clear files	19	33	110		156		x	
84-ERA-1	35	x											27	25	118		409	612		

Case No.	Dism.	Sett./ Withd.	Un-time	Disc. Eq.T.	Grant Eq.T.	Judg. Compl.	Rein-stat.	Back Pay	Atty. Fees	Aff. Relief	Misc. Relief	Compl. filed	Wage &Hour Decision	Hearing	Motion for Summ. Disp.	A. L. J. Decision	Sect.of L. Decision	Review by Ct. Apps	Enforcement by Dist.Ct.
84-ERA-2	x	x																	
84-ERA-4	x													x					
84-ERA-5	x	x											282		386	416	2yrs. 2mos.		
84-ERA-6	x		x	x								31			125	255		x	
84-ERA-7	x	x																	
84-ERA-8	x	x																	
84-ERA-9	x											7			61	90			
84-ERA-10	x											7			61	90			
84-ERA-11	x											19			49	78			
84-ERA-12	x											25			43	72			
84-ERA-13	(No decision available, only notice of hearing)																		
84-ERA-14	x	x												x					
84-ERA-15	x[30]											25	42	182		267	19mos		
84-ERA-16	x	x																	
84-ERA-17						x[31]	x	x	6,500.00		4,217.00 Job search	28	32	92		170	444[35]		
84-ERA-18	x	x											28	206		213[37]			
84-ERA-19	x	x																	
84-ERA-20	x	x																	
84-ERA-21	x	x																	
84-ERA-22	x	x																	
84-ERA-23	x	x																	
84-ERA-24	x											26	31	102		116	20mos.		
84-ERA-25	x	x																	
84-ERA-26	x	x																	
84-ERA-27	x		x	x[32]								30	32		397	433			
84-ERA-29	x	x																	
84-ERA-30	x[33]													x					
84-ERA-31						x	x	x	x			28		188		261			
84-ERA-33	x	x																	
84-ERA-35	x	x																	
84-ERA-36	x	x																	
84-ERA-37	x	x																	
85-ERA-1	x	x																	
85-ERA-2[34]						x	x	x	73,007.50		70,000 med.exp.	25	39	115		442	723		
85-ERA-3	x	x										[illegible]	[illegible]	[illegible]		[illegible]	[illegible]		

Case No.	Dism.	Sett./ Withd.	Un-time	Disc. Eq.T.	Grant Eq.T.	Judg. Compl.	Rein-stat.	Back Pay	Atty. fees	Aff. Relief	Misc. Relief	Compl. filed	Wage&Hour Decision	Hearing	Motion for Summ. Disp.	A. L. J. Decision	Sect. of L. Decision	Revew by Ct.Apps.	Enforcement by Dist.Ct.
85-ERA-5	x	x																	
85-ERA-6	x[38]																		
85-ERA-7						x[39]	x		5,593.75		Post copy of order	14	17	71		91	247		
85-ERA-8	x	x																	
85-ERA-9	x		x[40]																
85-ERA-10	x	x																	
85-ERA-11	x	x																	
85-ERA-12	x	x																	
85-ERA-13	x		x												x				
85-ERA-14	x	x																	
85-ERA-15	x											15			62	90			
85-ERA-16	x											8		156		244			
85-ERA-18,26	x	x																	
85-ERA-19	x	x																	
85-ERA-23				x[41]									81	224		309			
85-ERA-24	x												53[46]	275		360	419		
85-ERA-25	x													107[47]		218	261		
85-ERA-33						x	x	35,375.02	x			28	29	223		258			
85-ERA-34	x											27	55	77		119			
85-ERA-35,36	x		x	x								40	65	86		141			
85-ERA-38,39	x	x																	
85-ERA-40	x	x																	
85-ERA-41						x		5,054.25	x				66[48]	188		257			
86-ERA-2	x											9	48		x	191			
86-ERA-3	x	x																	
86-ERA-4	x											11	39	101		280			
86-ERA-8						x		1,414.88	x			18	37	99		191			
86-ERA-10	x	x																	
86-ERA-11	42													96[49]		116			
86-ERA-12	x[43]											20	23	66		114	193		
86-ERA-25	x[44]											28	31		x	119			
84-STA-1	x							5,388.70[45]				142[50]	?[51]	207		250	370		
84-STA-2	x																		
84-STA-3	x	x																	
84-STA-4	x	x																	
84-STA-5	x	x																	

Case No.		Dism.	Sett./ Withd.	Un- time	Disc. Eq.T.	Grant Eq.T.	Judg. Compl.	Rein- stat.	Back Pay	Atty. fees	Aff. Relief	Misc. Relief	Compl. filed	OSHA Decision	Hearing	Motion for Summ. Disp.	A. L. J. Decision	Sect. of L. Decision	Review by Ct. Apps.	Enforcement by Dist.Ct
84-STA-6	1						x		961.54	6,674.47			16	84	155		187	270	x	
84-STA-7	2	x																		
84-STA-8	3	x																		
84-STA-9	4	x	x																	
84-STA-10	5	x											177	156	212		239			
84-STA-11	6	x																		
84-STA-12	7	x	x																	
84-STA-13a	8	x													x					
84-STA-13b	9	x[52]						x[53]	4,354[54]				16	96	199		335	458		
84-STA-13c	10						x[55]	x	4,350			Cleared Pers.file			x					
84-STA-14	11	x	x																	
84-STA-15	12	x											32	65	201		219	339		
84-STA-16	13	x		x[56]	x											x				
84-STA-18	14	x	x																	
84-STA-20	15	x		x	x								185	214	387		583	702		
85-STA-1	16	x	x																	
85-STA-2	17	x	x																	
85-STA-3	18						x		1,389.89	750.00		Clearedfile			x					
85-STA-4	19	x		x	x								220	212		x	322	392		
85-STA-5	20	x	x																	
85-STA-6	21	x	x																	
85-STA-7	22	x	x																	
85-STA-8	23						x	x	x				77		48		266	335		
85-STA-9	24	x											3	392	478		631	744		
85-STA-10	25	x	x																	
85-STA-11	26	x											35	114	364		458			
85-STA-12	27	x	x											269		372	379			
85-STA-13	28	x											18	195	300		349	410		
85-STA-14	29	x											23	224	454		540			
85-STA-15	30	x	x										41	260	x		471			
86-STA-2	31	x																		
86-STA-4	32	x	x																	
86-STA-5	33						x	x	x	4,049.44		Cleared pers file	67	60	162		221	324		
86-STA-8	34	x											1	215	292		311	354		
86-STA-10	35	x	x																	
86-STA-11	36	x	x																	
	37																			

Notes to Table 8

1 Two acts of retaliation alleged. First held untimely, second without merit.

2 Reversal of ALJ by Secretary of Labor, who granted equitable tolling and found for complainant.

3 Two complaints filed.

4 Reversal of ALJ by Secretary of Labor, who granted equitable tolling and found for complainant.

5 Complainant had not been fired.

6 Same

7 Decision of Secretary of Labor.

8 Complainant had not been fired.

9 Waived by complainant.

10-14 Assumes complainant had filed 30 days after employer's action.

15 Loss to reputation and mental distress award limited by Secretary of Labor.

16 Reversal of ALJ by Secretary of Labor, who dismissed complaint.

17 Reversal of ALJ by Secretary of Labor on damages for pain and suffering.

18 Reversal of ALJ by Secretary of Labor on reinstatement.

19 Reversal of ALJ by Secretary of Labor; remanded and settled.

20 Secretary of Labore's decision affirmed in part, reversed in the part; damages allowed for pain and suffering.

21-23 See note 10.

24 Complaint refiled 19 months later.

25 See note 10.

26 See note 10.

27 Overturns Secretary of Labor and ALJ.

28 See note 10.

29 Remanded and settled.

30 Remanded by Secretary of Labor; dismissed again by ALJ.

31 Settled following remand on damages.

32 Assumes ALJ overturned on equitable tolling.

33 Secretary of Labor reversed ALJ, orders reinstatement and remands for backpay determination.

34 Pending.

35 Remanded by Secretary of Labor for premature closing of record.

36 Settled after ALJ decision.

37 Settled.

38 Settled after ALJ decision.

39 Settled before final order of the Secretary.

40 Complaint timely; request for hearing untimely.

41 Remanded by ALJ to WHD to determine whether violations occurred within 30 days of complaint.

42 Remanded by ALJ to WHD.

43 Remanded by Secretary of Labor.

44 ALJ decision reversed by Secretary of Labor.

45 Secretary of Labor decision.

46-49 See note 10.

50 For STAA cases, statute of limitations is 180 days.

51 For STAA cases, OSHA is investigative agency.

52 Secretary of Labor reversed decision of ALJ and ordered relief.

53 Secretary of Labor decision.

54 Secretary of Labor decision.

55 Secretary of Labor reversed ALJ and denied relief.

56 Complaint timely, request for hearing untimely.

STAA	49 U.S.C. sec. 2305 (Supp. III 1985); 29 C.F.R. Pt. 1978, 51 Fed. Reg. 42091 (1986)
SWDA	42 U.S.C. sec. 6971 (1982); 29 C.F.R. Pt. 24 (1986)
TSCA	15 U.S.C. sec. 2622 (1982); 29 C.F.R. Pt. 24 (1986)
WPCA	33 U.S.C. sec. 1367 (1982); 29 C.F.R. Pt. 24 (1986)

Table 10. Abbreviations

AHERA	Asbestos Hazard Emergency Response Act of 1986
ASHDCA	Asbestos School Hazard Detection and Control Act of 1980
BLA	Board of Land Appeals
CAA	Clean Air Act
CBO	Congressional Budget Office
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act of 1980
CSRA	Civil Service Reform Act of 1978
DOD	Department of Defense
DOD84	Department of Defense Authorization Act, 1984
DOD87	Department of Defense Authorization Act, 1987
DOI	Department of the Interior
DOL	Department of Labor
DOT	Department of Transportation
EDUC	Department of Education
EO12196	Occupational Safety and Health Programs for Federal Employees, 1980
EPA	Environmental Protection Agency
ERA	Energy Reorganization Act of 1974
FHWA	Federal Highway Administration
FMSHA	Federal Mine Safety and Health Act of 1977
FRA	Federal Railroad Administration
FRSAA	Federal Railroad Safety Authorization Act of 1980
GAO	General Accounting Office
IG	Inspector General
ISCA	International Safe Containers Act
LMRA	Labor Management Relations Act
MSAWPA	Migrant Seasonal and Agricultural Worker Protection Act
MSHA	Mine Safety and Health Administration
MSHRC	Mine Safety and Health Review Commission
MSPB	Merit Systems Protection Board

Table 9. Citations to Statutes and Regulations

AHERA	Pub. L. No. 99-519, sec. 211, ___ Stat. ___
ASHDCA	11 U.S.C. sec. 525 (1982)
CAA	42 U.S.C. sec. 7622 (1982); 29 C.F.R. Pt. 24 (1986)
CERCLA	42 U.S.C. sec. 9610 (1982); 29 C.F.R. Pt. 24 (1986) (semble)
CSRA	5 U.S.C. sec. 2302(b)(8)(A) (1982); 5 C.F.R. Pts. 1252-53 (1986); 32 C.F.R. Pt. 145 (May 9, 1986) (DOD cooperation with OSC)
DOD84	10 U.S.C. sec. 1587 (Supp. III 1985); DOD Directive No. 1401.3 (July 19, 1985)
DOD87	Pub. L. No. 99-661, sec. 942, ___ Stat. ___, adding 10 U.S.C. sec. 2409
ERA	42 U.S.C. 5851 (1982); 10 C.F.R. sec. 50.7 (1986); 29 C.F.R. Pt. 14 (1986)
FMSHA	30 U.S.C. sec. 815(c) (1982); 29 C.F.R. Pt. 2700 (1986)
FRSAA	45 U.S.C. sec. 441 (1982)
ISCA	46 U.S.C. sec. 1506 (1982)
LMRA	29 U.S.C. sec. 143 (1982)
MSAWPA	29 U.S.C. sec. 1855(a) (1982); 29 C.F.R. sec. 500.9 (1986)
NLRA	29 U.S.C. sec. 158 (1982)
OSHA	29 U.S.C. sec. 660(c) (1982); 29 C.F.R. Pt. 1977 (1986)
SDWA	42 U.S.C. sec. 300j-9 (1982); 29 C.F.R. Pt. 24 (1986)
SMCRA	30 U.S.C. sec. 1293 (1982); 30 C.F.R. Pt. 865 (1986); 43 C.F.R. sec. 4.1200 (1986)

NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
OALJ	Office of Administrative Law Judges
OASD(A)	Office of the Assistant Secretary of Defense (Administration)
OGC	Office of General Counsel
OPM	Office of Personnel Management
OSC	Office of Special Counsel
OSHA	Williams-Steiger Occupational Safety and Health Act of 1970 (or Occupational Safety and Health Administration)
OSMRE	Office of Surface Mining Reclamation and Enforcement
OTA	Office of Technology Assessment
SDWA	Safe Drinking Water Act
SMCRA	Surface Mining Control and Reclamation Act of 1977
STAA	Surface Transportation Assistance Act of 1982
SWDA	Solid Waste Disposal Act
TSCA	Toxic Substances Control Act
USCG	U.S. Coast Guard
WHD	Wage and Hour Division
WPCA	Federal Water Pollution Control Act of 1972

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-3

CONTRACTING BY THE FEDERAL GOVERNMENT FOR LEGAL SERVICES: A LEGAL AND EMPIRICAL ANALYSIS

by

William V. Luneburg

Professor of Law
University of Pittsburgh
School of Law

September 30, 1987

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Appendix A Agency Use of Outside Counsel

Appendix A-1 Federal Aviation Administration

Appendix A-2 Veterans Administration

I. Introduction[*]

In the private sector, traditionally corporations have obtained needed legal services not only by hiring attorneys to work full-time as their employees but also, and commonly, by contracting with private lawyers or firms to furnish advice or other assistance. The escalating costs of legal services has caused reevaluation of this practice,[1] though reliance on outside counsel, particularly in the area of litigation, remains substantial.[2]

Contracting for legal services by the Federal Government has in the past, and continues to be, the exception rather than the rule. Legal services are generally provided by agency staff or the Department of Justice. However, the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation contract out a sizeable amount of their legal work, a large portion of which is litigation-related. Their expenditures for outside counsel have grown geometrically since the early 1980's as more and more banking institutions within their respective jurisdictions have experienced serious financial problems. In 1985 it was reported that these two government entities together accounted for eighty percent of all fees paid by the federal government to outside counsel during 1983 and 1984.[3] Moreover, according to that article, eighteen federal agencies and departments (including the FDIC and FSLIC) paid a total of approximately $50 million in 1983 and 1984 for the services of private lawyers.[4] The statistics thus collected indicated that the practice of legal service contracting extended far beyond the banking agencies.[5]

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[*] An earlier draft report dealing with federal agency hiring of outside counsel was prepared for the Administrative Conference of the United States by the law firm of Wolf, Block, Schorr and Solis-Cohen. The report that follows draws, to some degree, on the research and interviews conducted by that prior consultant, though the analysis and conclusions contained herein differ substantially from the Wolf Block Report. The footnotes herein cross-reference the appropriate portions of that report when it is expressly relied upon.

The author would like to acknowledge the efforts of three University of Pittsburgh students, Elizabeth C. Detwiler, Stephen M. Rosenblatt, and Marianne G. Emig, whose work in conjunction with this study was invaluable. Moreover, many federal officials took the time to discuss with me the issues raised in this report as well as review earlier drafts. Obviously the final product reflects my findings and judgments, not necessarily theirs. Of particular assistance were William S. Coleman, Jr. (Deputy Associate Administrator, Office of Federal Procurement Policy), Thomas A. Rose (Deputy General Counsel) and Carroll R. Shifflett (Assistant General Counsel) of the Federal Deposit Insurance Corporation, and Ronald J. Oberle (Associate General Counsel) of the Federal Home Loan Bank Board.

[1] See, e.g., Fischer, The Changing Role of Corporate Counsel, 4 J. Law & Comm. 45 (1984).

[2] See generally "The Role of Corporate Counsel in Litigation," ALI-ABA Course of Study Materials (1986) (hereinafter "ALI-ABA Materials").

While reliance by private corporations on both in-house and outside attorneys is hardly a matter of public concern and debate, the Federal Government's similar practice has provoked both publicity and debate, though the scope of the government's use of private counsel is, in most instances, less on a relative scale than in the case of many private corporations. There appear to be at least three basic sources for this differing reaction:[6]

a. While elimination or encouragement of the government's reliance on private attorneys will hardly result by itself in balancing the federal budget, the current concern for mounting federal deficits and the needs for effective control translates into a perceived need to insure that all government operations are conducted on a cost-effective basis to the extent that the law permits this. Since government personnel costs related to full time employee-attorneys may be substantially less (or more) than the cost of obtaining private legal assistance in particular cases, the "make or buy" decision with regard to legal services is potentially a fruitful area for examination.

b. While "favoritism" in choosing a legal advisor may be bad business for a corporation, it may present both that problem and more in the public sector. This has a variety of aspects, the most important being that the government presumably does not operate for the benefit of private entities or individuals who have an inside track on obtaining its largesse. It is expected that government moneys will be used largely for "public" purposes and not "private" advantage. The very legitimacy, and therefore the effectiveness, of the government requires that both the fact and substantial appearance of "favoritism" be avoided in government contracting.

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[3] _Nat'l_ _Law_ _J._, Feb. 4, 1985 at 1, col. 3.

[4] _Id._ The FDIC spent in excess of $30 million in 1983-4 and the FSLIC in excess of $8 million during that period. Most of this was charged against the estates of the failed institutions, not appropriated funds.

[5] _Id._

[6] In addition, the size of the corps of lawyers in the employ of the United States Government no doubt prompts a questioning reaction when it is revealed that private sector lawyers are also relied upon. Statistics indicate that in 1985, the government employed over 20,000 lawyers (not counting the federal judiciary). _See_ B. CURRAN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 at 3 (1986) (3.1% of all 655,191 lawyers).

c. Finally, the place of the law and the lawyer in government must be considered. It is impossible to divorce the ideas of government and law, at least as traditionally conceived in this country. Law is what knits the various parts of the governmental organism together and law is generally perceived to be largely the exclusive preserve of the lawyer. From this it can be argued that, unless the government's lawyers owe exclusive fealty to it in their work (i.e. are its employees which it can control), the distinction between the public and private sector vanishes and with it the idea that the government exists to large degree to control private activity for a "greater good."[7]

More specifically, regardless of the difficulties of categorizing many types of governmental action as "executive" as opposed to "judicial" or "legislative" for various separation of powers issues,[8] most would concede that the authority to sue in a judicial proceeding to enforce federal law is "executive power."[9] Traditionally it is the lawyer who is the principal actor in the execution of this power by his monopoly with regard to access to the courts. As the Supreme Court has indicated, responsibility for conducting civil litigation in the courts of the United States to vindicate "public rights" must be vested in "Officers of the United States" appointed by the President[10] or, if Congress permissibly so authorizes, by "the Courts of Law" or the "Heads of Departments."[11] Unless a private attorney retained to litigate for the government is appointed as an "officer," the contract may involve an unconstitutional delegation of power where an "Officer of the United States" does not possess or in fact does not exercise sufficient control over the activities of the private attorney in his or her handling of the litigation.[12]

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[7] This is not to say, however, that the public/private sector boundaries in the United States are clearly distinct. See generally Symposium, The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982).

[8] See, e.g., Bowsher v. Synar, 106 S. Ct. 3181 (1986); Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983).

[9] See, e.g., Buckley v. Valeo, 424 U.S. 1, 138 (1976).

[10] Id. at 138-39, 140.

[11] U.S. CONST. art. II, § 2.

Moreover, governmental policy-making itself is a function that must ultimately be vested, if not in Congress, then in the President or an "Officer of the United States" appointed in the manner prescribed by Article II of the Constitution.[13] To the extent that the activities of a private attorney retained by the government can be considered to involve policy-making, the need for sufficient control by "officers" of the United States is similarly present.[14]

Finally, aside from any constitutional arguments, there are a variety of pragmatic considerations which must be considered in connection with the government's use of private counsel to perform both litigation and non-litigation services and the degree of control required.[15]

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[12] "Officers of the United States" do not include all "employees" of the United States; "employees" are "lesser functionaries subordinate to officers of the United States." 424 U.S. at 126 n.162. As noted later, the distinguishing characteristic of a federal "employee" for statutory, and presumably constitutional purposes, is the degree of control exercised over his or her work. See text at notes 44-52 infra. See generally Friedlander v. United States Postal Service, 64 Pike & Fischer, Administrative Law (2d) 1337 (D.D.C. 1987) (The court rejected a claim that the Postal Service is a business enterprise wholly independent of the executive branch of government and therefore functions unconstitutionally. In part the court's reasoning focused on the degree of control exercized by the executive officials, including the Attorney General, over the USPS and its activities, including litigation).

[13] See Buckley v. Valeo, 424 U.S. at 126 ("any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'"); 140-41 ("rulemaking . . . represents the performance of a significant governmental duty exercised pursuant to a public law . . . [and] may . . . be exercised only by persons who are 'Officers of the United States.'"). "Policy-making" delegated by Congress to the President or his appointees is currently viewed as an "executive function." See Bowsher v. Synar, 106 S. Ct. at 3192 (1986); Immigration and Naturalization Service v. Chadha, 462 U.S. at 953-54 n.16.

[14] See Melcher v. Federal Open Market Committee, 644 F. Supp. 510, 523 n.26 (D.D.C. 1986) (composition of Federal Open Market Committee to include other than governmental officials held to be constitutional, in part because of the nature of the authority exercised and the degree of control retained by governmental officials). See also Bruff, The Constitutionality of Arbitration in Federal Programs (A Report to the Administrative Conference of the United States) (May 27, 1987) at 17-23.

Adequate control presumptively exists when a full-fledged employer-employee relationship has been established. This is not to say, however, that there are no circumstances where countervailing considerations, including the need to conduct operations in a cost-effective manner, may not justify some departures from the norm.

Traditionally, most federal agencies have relied on their own legal staffs for non-litigation services. Congress has largely concentrated litigation services for the government in the Department of Justice.[16] There have been instances, however, where a federal entity has been given the power by statute to litigate through its own employees[17] or even by outside counsel.[18] Moreover, on occasion Justice has entered into memoranda of understanding with certain agencies permitting the latter to represent their interests in court though their own attorneys.[19]

The report that follows examines the legal (including policy) issues presented by agency use of outside counsel for litigation and non-litigation services. The basic questions are (1) whether and when such legal services contracting is permitted as a matter of law; (2) what considerations should govern the decision to seek outside assistance where the necessary authority exists; and (3) what procedures must or should be followed in the procurement of those services. The three concerns discussed above are central to the treatment of these matters.

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[15] See note 42 infra.

[16] See 28 U.S.C. § 3106 (1982):

> Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice . . . . (emphasis added).

See also 28 U.S.C. §§ 516, 518, 519, 547(2) (1982). See generally note 42 infra for the reasons for this.

[17] See, e.g., 7 U.S.C. § 228a (Department of Agriculture); 15 U.S.C. § 56 (Federal Trade Commission); 15 U.S.C. § 2061(e) (Consumer Product Safety Commission); 42 U.S.C. § 7605 (Environmental Protection Agency).

[18] See, e.g., 10 U.S.C. § 1037 (Department of State); 15 U.S.C. § 637(b)(1)(E) (Small Business Administration); 22 U.S.C. § 2504 (Peace Corps); 26 U.S.C. § 9010 (Federal Election Commission).

[19] See, e.g., 42 U.S.C. § 7605(b) (EPA).

The fundamental conclusion of this report is that the government may justifiably contract out for legal services where it will be cost-effective to do so, but only in a such a manner as to avoid the fact or appearance of favoritism and only where close control over attorney conduct is either clearly present or unnecessary in order to protect the constitutional and other concerns noted previously.[20]

Unfortunately, in practice this general proposition is easier to state than apply. For example, it may be cheaper in monetary terms to use inside counsel on a case but, because of the lack of expertise of agency attorneys, the likelihood of a satisfactory result may be less in some, perhaps, unknown degree than if outside counsel is used. Unless a statute mandates that a particular procedure be followed in procurement, difficult choices may be presented in fashioning a procedure that both mitigates the costs of delay and at the same time substantially dissipates appearances of favoritism. Finally, the degree of control necessary in a particular case cannot be decided in the abstract. Only close attention to the particular facts and surrounding context can result in a satisfactory resolution of this problem.

As a point of departure, the first section to follow examines current corporation practices with regard to retaining outside counsel. This offers some insights into practices and procedures that may help ensure cost-effectiveness in government use of the legal services of non-government attorneys. Then the report discusses the law of procurement and civil service as it applies to service contracting. The 1986 Debt Collection Amendments,[21] which authorize the Department of Justice to contract with private attorneys to collect delinquent loans, are then discussed in detail for the light they shed on the issues presented. A survey of current agency practice focusing on the experience of the FDIC and FSLIC follows this. After a short discussion of the applicability of federal conflict of interest law, general conclusions and recommendations are set forth.

II. Corporate Practice in Retaining Outside Counsel: A Point of Comparison

As noted at the outset of this report, the federal government is not the only entity that both employs on a full-time basis a staff of attorneys and also retains outside counsel to provide it with legal services. This is common practice for most corporations and other business entities, though in recent years the escalation of the costs of legal services has been a potent factor forcing reconsideration of traditional approaches in this area.[22] Still apparently forty per cent of the expenditures of corporate legal departments is for outside counsel.[23] Obviously there are significant distinctions between the federal agency and the private sector purchaser which must be considered in drawing on the latter's experience and practices. In this regard the most significant differences include the congressional policy of vesting the Department of Justice with most of the litigation authority of the federal government,[24] along with the public interests at stake in government litigation and other legal matters.

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[20] See text at notes 8-15 supra.

[21] Pub. L. 99-578 (approved October 28, 1986).

Nevertheless examination of private sector practice may be a source of good ideas that can defensibly be emulated by the various federal agencies and other entities. In fact, as will be seen later in this report,[25] at least some federal agencies do follow practices that find clear analogies in the corporate area. There is no reason to believe that by continuing to study each other's approaches to the problems of retaining outside counsel, the practices of each cannot be improved.[26]

As part of the research for this study, an informal survey was conducted of corporations with regard to their practices in retaining outside counsel. The subjects included businesses involved in manufacturing, service and other areas.[27] In addition various published materials dealing with corporate practices were reviewed.[28]

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[22] But see ALI-ABA Materials at 9 ("The results [of survey] tend to show that despite the large amount of publicity which has been given to the growth of in-house litigation departments, the bulk of corporate litigation is still handled in the traditional way, by outside counsel"). The Charts reprinted in notes 29, 32 and 37 infra were prepared as part of the 1985 survey of corporate law departments by Price Waterhouse. They are reprinted here with permission. All rights reserved.

[23] Id. at 23.

[24] See text at notes 16-19 supra.

[25] See text at notes 321-432 infra.

[26] The American Corporate Counsel Association may be a source of information for federal agencies interested in learning more regarding coporate practice.

[27] This survey included H.J. Heinz Co., PPG Industries, Inc., USX Corporation, Westinghouse Electric Corp., Equimark Corp., USAir, Allegheny International, Mellon Bank Corp., Dravo Corp., Consolidated Natural Gas Co., Rockwell International, Koppers Co., Inc., and the Aluminum Company of America. Since some of the

The survey and literature disclosed a considerable lack of uniformity in the manner in which corporations deal with the matter of outside counsel as well as some practices that, on their face, might be profitably adopted by federal agencies:

1. The Presence of Written Guidance. Some corporations have no internal documents that relate to the retention and supervision of outside counsel. This may be due to the fact that use of outside counsel is infrequent. Alternately, only one or a few persons may generally be involved in the hiring decision and the follow-up and it is not considered essential to write down what procedures must be observed.

Where memorialization of the practices exists, it ranges from the general to the very specific. Matters covered in the guidance documents include the criteria for deciding when to contract-out for the services, the considerations relevant to the choice of a

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companies consider their approaches to retaining and supervising outside counsel "confidential," there is no specific attribution in this report for various statements.

The questionnaire to these companies indicated the following areas of interest:

1. The type or types of legal services which are provided to the company through outside counsel.

2. The reasons for seeking outside legal advice where the corporation already employs attorneys.

3. The process used to choose a firm or attorney (e.g., some type of competitive bidding arrangement).

4. The criteria employed to choose a particular firm or attorney and whether these criteria or the process of choice are described in any internal written document.

5. The type of supervision or control maintained and the means for doing this (e.g., weekly status reports).

6. Conflict of interest or other ethical problems that have arisen and how the likelihood of these problems can be reduced.

7. The range of fees for attorney, paralegal and support services paid to outside counsel.

[28] See note 2 supra.

particular attorney or firm to handle a problem, the nature of the supervision expected of inside counsel over the outside attorney, and reporting and billing practices.

2. Reasons for Seeking Outside Counsel. There are a variety of stated reasons for seeking outside legal services.[29] For some

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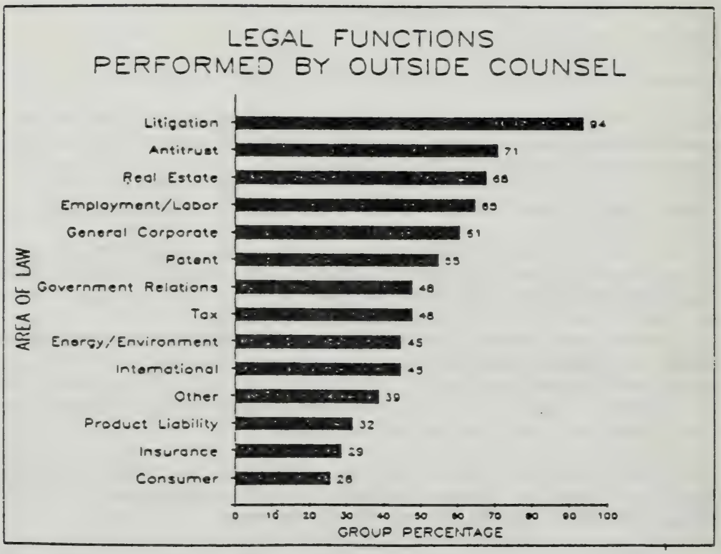
[29] See generally ALI-ABA Materials at 30, 50-53.



corporations, litigation is always, or almost always, the preserve of outside counsel. Often one of the principal motivating factors in the hiring decision is the limit on staff resources and time to do necessary work. Somewhat related to this is the need for specialized expertise that cannot be found within the corporation's ranks. However, where a particular type of legal problem is likely to recur, the argument for hiring additional staff to deal with that situation may prevail depending on a variety of factors, including the cost of hiring outside counsel on a regular basis to handle such cases. Where lack of in-house expertise is cited as a reason, often the legal issues presented are governed by local or state law or by certain aspects of federal law that are generally within the domain of specialists.

In some instances corporations ask for the legal advice of outsiders because of a particular need for "independence" in the rendering of the opinion or as a check on an opinion rendered internally in an area where the inside lawyer may have some experience but not as much as outside counsel and some "comfort" might be obtained by confirmation of the inside view. In other cases outside counsel, because of his or her prior contacts with the decisionmaker or otherwise, may have knowledge of the decisionmakers' concerns not possessed by the employees of the client or be perceived by the decisionmaker as someone who should be listened to closely. Somewhat along the same line a local judge or jury may view with skepticism or hostility presentations by attorneys coming from outside the district. Or, finally, the cost for the corporation of transportation to and lodging in the geographical location of trial may be so great that the only cost-effective manner of proceeding is to hire locally.

3. Procedures for Choosing Counsel. The survey disclosed few instances where a formal bidding procedure for hiring outside

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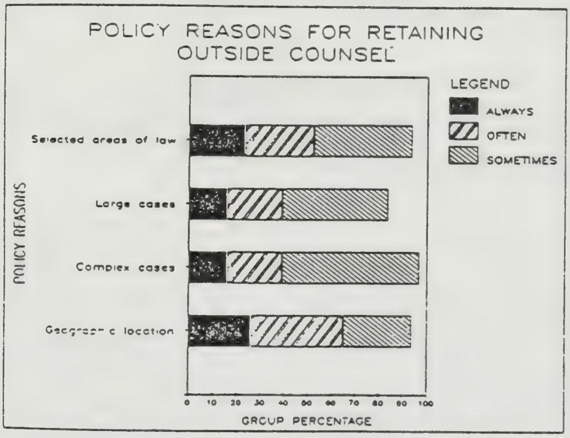

counsel was adopted.[30] Apparently an underlying assumption is that competitive procedures may not adequately permit examination of the quality of the service provider, though, as will be noted below, procedures for competition can be designed to consider both cost and other relevant factors.[31] While formal competitive procedures might be eschewed by corporations, however, informal cost comparison between firms is often engaged in.

A corporation may have a continuing relationship with a firm or firms in a particular geographical area or areas. This relationship may give rise to confidence by the client that the firm will give it good work at an economical price and, therefore, little shopping around for alternatives may be engaged in as needs for legal services arise. These firms can also provide references to other lawyers where the firms cannot, for one reason or other, provide needed assistance to the corporation.

Many companies surveyed maintained lists of firms which had been used in the past as a starting point for the search for a lawyer. In one case the corporation maintains a computerized list of firms presently employed or those utilized within the recent past along with a list of firms which have not been relied for several years. This listing, periodically updated, includes evaluations of the firms and their lawyers based on the quality of work product, promptness, responsiveness and depth of research, cost of handling matters, and results obtained on prior occasions. That listing also includes the rates charged in the past and on pending cases along with the types of work performed by the firms listed.

Where there is written guidance regarding criteria for determining when to go outside and whom to choose, there may be instructions to staff regarding the considerations that should be taken into account to insure that the hire is cost-effective.

4. Supervision and Control. The degree of supervision and control of the work of outside counsel by corporate employees varies from little to a "team" approach whereby inside and outside counsel work hand in hand.[32] In some instances corporate legal

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[30] Id. at 31. See also note 32 infra.

[31] See text at notes 165-68 infra. But see note 201 infra.

[32] See ALI-ABA Materials at 32.

departments routinely exercise close control. For other corporations the extent of control is decided on a case by case basis. Even where corporate counsel is not part of the "team," he or she may have to be copied on all pleadings, motions, and correspondence prepared, at least where they are deemed "significant" by the outside attorney handling the matter. There may be a requirement imposed generally or in specific cases for prior approval of any pleadings, motions and other documents of importance. In some instances the corporation may reserve the right to approve all discovery or may in fact take over the pretrial aspects of a case entirely.

At the time a matter is referred to outside counsel, a general plan for handling the case may be jointly agreed upon by corporate counsel and the attorney retained. A litigation budget of some detail may also be agreed upon and periodically updated as a method of cost control.[33] Moreover corporate counsel may be involved in approving which particular associates and paralegals work on the case or at least signing off on a general proposal for staffing. Outside counsel may be instructed that the corporation will not pay for the time necessary to educate new members of the "team" regarding the case and the issues raised where there are staffing changes. Time for basic legal research in an area necessary to educate firm lawyers may not be billable to the client.[34] Management programs, including proprietary, standardized forms and associated software, are available to control litigation costs.[35]

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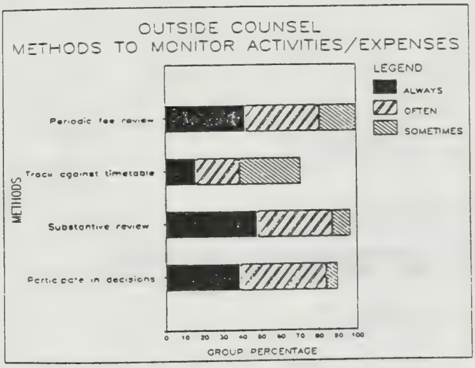

[33] *Id.* at 138.

[34] *Id.* at 74.

[35] *Id.* at 93-123.

In order to avoid misunderstandings regarding the expectations and restrictions applicable to the outside counsel in handling legal work assigned, the corporation may distribute to outside attorneys a written description of the procedures which apply to the handling of the case.[36] For this reason or others, the decision to go outside, the choice of counsel, and the supervision activities may be concentrated in the general counsel's office of the corporation.

Written status reports may be required, though some corporations seem to think that this is not a cost-effective way to maintain control and supervision. It may create billable attorney time which can be saved by a phone call.

5. Fees. Naturally fee arrangements vary with the type of work.[37] Where hourly rates are charged, they generally range from $80 up to $300 depending on the nature of the problems presented, the geographical location where the services are rendered, and the expertise and repute of the lawyer or firm hired. Fees for paralegals generally range from $25 to $70. Flat fees and "sharing" arrangements are utilized on occasion. However, it is often not the hourly rate that is crucial in the decision to retain outside counsel because, for example, the overall bill for

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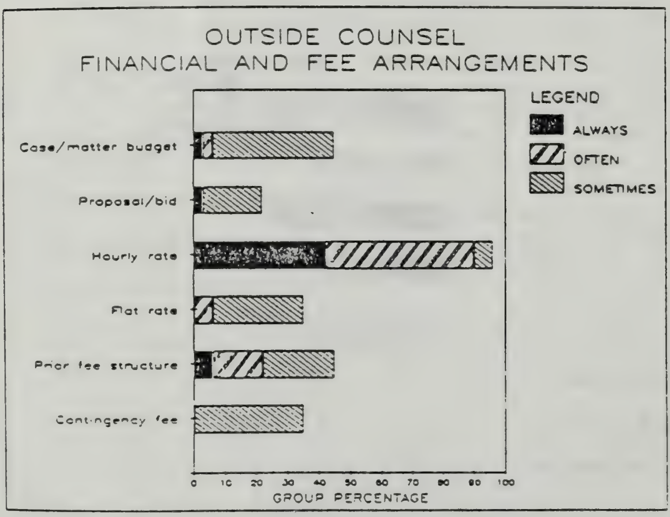
[36] *Id.* at 66-80 (for an example of a written description of the procedures which apply to a firm when handling a case for CIBA-GEIGY Corp.).

[37] *See* ALI-ABA Materials at 31.



an experienced, but high-priced, attorney may be less than if the work is billed at a lower rate by one who has had little exposure to the issues raised. Of course, even if the cost is greater, the quality of work may justify the larger fee.

Discounts in normal fee are often negotiated and fee comparisons between firms may be made before choice of an attorney. Moreover, once the relationship is established, the corporate client may require notice and advance approval before a rate schedule for partners, associates and paralegals is increased and the client is expected to pay the increased fees. Some corporations specify the type of overhead charges for which it will be responsible.[38] They may also indicate that where work is done on their behalf that might be used for other clients (and for which those clients may be billed) an appropriate discount of the fees charged to the corporate client is expected. Furthermore, cost control may be achieved by refusing to pay for familiarization with the case of partners, associates and paralegals who replace other such personnel in handling the matter.

6. Billing Practices. A requirement for monthly invoices is not uncommon. This allows the corporate client to keep a close watch on costs before they skyrocket out of control. Information requested from outside counsel on invoices for payment generally includes the names of the individuals performing the services during the reporting period, the hourly billing rates for them, the dates of work, description of the work done and time spent, miscellaneous charges for which reimbursement is sought, and the aggregate amount of the fees billed on the matter to date.

Clearly many corporations are increasingly taking steps to insure that the use of outside counsel is cost-effective.[39] It is also the case that where a corporation does a significant amount of litigation in-house, one of the main reasons for this is the perceived need for more control,[40] a factor which is an extremely important consideration with regard to federal agencies' utilization of the services of outside counsel.[41]

III. Government Use of Outside Counsel: In General

In obtaining legal services, whether or not of a purely advisory nature, two bodies of law are potentially relevant: the law of civil service and public contract law. The former is largely in the domain of the Office of Personnel Management (OPM).

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[38] Id. at 75.

[39] Id. at 49-50.

[40] Id. at 18 (cost is also a principal factor).

[41] See text at notes 8-15 supra.

The latter is regulated to a great degree by the General Services Administration and the Department of Defense along with the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget. The relationship between the agency and the person providing services may fall wholly within the civil service regime, wholly within the realm of government procurement law, or span both systems of regulation. Generally speaking, when an employer/employee relationship has been established, civil service law provides the applicable governing restrictions. When the service provider is acting as an independent contractor, procurement principles alone control. In determining how to characterize the relationship, the degree of government supervision and control over the work of the service provider is of upmost importance.

Viewing matters in this manner, one of the principal issues raised by agency retention of outside counsel relates to the matter of control. In view of the governmental, public and private stakes at issue where legal services are rendered, should an agency use other than full-time employees which it can control and supervise on a continuing basis? Where the agency wants to obtain merely an outsider's legal evaluation, the need for close control over the performance of the attorney's work would appear not to be generally called for. However, where the attorney litigates on behalf of the government, there are serious questions whether the agency should (or can in some instances) surrender that degree of control necessary to permit characterization of the contractor as "independent" as that term is generally used in government personnel law.[42] The degree of control requisite in

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[42] The Justice Department has noted:

> The authority of the Attorney General over litigation is recognized by law, see 5 U.S.C. § 3106 and 28 U.S.C. §§ 516, 518, 519, and 547(2). This authority is supported by both constitutional doctrine and eminently practical considerations.
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> . . . [T]he Supreme Court has held that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" may be vested only in "Officers of the United States" who have been appointed in conformance with the provisions of the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 140 (1976). If the private counsel who are hired to represent the United States are not appointed as officers of the United States, it is questionable whether they may execute the law by engaging in negotiation, compromise, settlement, and litigation on behalf of the

furnishing legal services in matters falling between these extremes is less clear cut, though, aside from constitutional

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> Attorney General. In particular, we do not believe that individuals who are not officers of the government may commit or dispose of the property of the United States as would be implicated in the power to initiate or settle a claim.
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> The practical considerations include the risk of inconsistent positions being put forward on legal issues, the possible resulting burden on the citizenry, and the waste resulting from duplication of effort. The benefits of having the government's legal business concentrated in one well-trained and experienced corps of litigators, committed to government service and subject to the supervision of the nation's chief legal officer, are obvious.
>
> The broad use of private attorneys for litigation on behalf of the United States would, almost inevitably, result in inconsistent litigating positions. Further, private law firms may not be familiar with general litigating policies of the government or with the government's interests in other areas of the law. The uncoordinated activities of private attorneys could thus have a detrimental effect not only on the conduct of particular litigation but also on the government's litigating efforts generally.
>
> Lack of adequate supervision and control is also likely to result in increased governmental exposure to suits seeking damages for the acts and omissions of such private counsel. Attorneys without experience in representing the government, and without day-to-day supervision by experienced government officials, would be unfamiliar with the special problems of public practice and the special standards of conduct to which government attorneys are generally held. Conversely, for the Department to expend the substantial resources necessary adequately to supervise private counsel . . . would almost certainly make the retention of private attorneys uneconomical and impractical.

concerns,[43] the need to protect the governmental and public interests at stake would seem, as a policy matter, to create at least a presumption in favor of substantial supervision and control. Agencies may not be able to both retain close control and escape the restrictions applicable to government employees filling legal service positions. Where supervision and control of an outside attorney is sufficient to justify a classification of the attorney as an "employee" of the government, the agency will have to point to specific statutory authorization for the hire and, in addition, may be subject to certain aspects of government personnel law.

Moreover, other considerations may influence an agency's structuring of its relationship with the legal service provider. On the one hand, limitations on compensation and conflicts of interest which attach to employment, but not independent

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> All of these problems would be compounded if agencies other than the Department of Justice were given authority to contract for private litigation services. The possibility of inconsistent positions being taken in litigation would become a virtual certainty, with a predictably adverse impact on the government's general litigating program. Decentralization could increase the risk of losing otherwise meritorious cases, and of adding to the government's liability in terms of counterclaims and negligence actions. If it would be difficult for the Department effectively to supervise and efforts of private counsel without the expenditure of substantial attorney resources, it seems doubly unlikely that the Department or any agency could do so with respect to attorneys hired by other agencies.

Letter of Arnold I. Burns, Deputy Attorney General, Department of Justice to the Honorable Marshall J. Breger, Chairman, Administrative Conference of the United States (Nov. 10, 1986) (hereinafter "Burns Letter").

It should be noted that the thrust of this letter is to support vesting litigation power in the Department of Justice. Congress has not always done so. See text at notes 17-19 supra. Where it has not, however, many of the same arguments invoked by Justice argue for close control by the agency vested with litigation authority.

[43] See text at note 14 supra.

contractor, status may inhibit obtaining the service provider which the agency wants to retain. On the other, competitive procedures attach to the procurement of services and limit agency discretion to a degree which may be found undesirable. There may be no ideal resolution of the tensions thereby created. Moreover, as noted previously, in some cases (perhaps rare ones) both systems of regulation may attach to some degree.

In retaining outside counsel, whether in a purely advisory capacity or otherwise, an agency must make a variety of inquiries:

1. Is there authority, statutory or otherwise, for the retention? While the agency's organic statute may seem to permit it, detailed analysis of both the relevant statutes and the type of relationship sought to be established is required. For instance, where the attorney will litigate, even though the agency may have statutory authority to enter into an "employment" relationship with outside lawyers in some circumstances, the statutes vesting litigation responsibility in the Department of Justice may limit what appears to be a broad grant of authority.

2. Has there been a demonstration of need sufficient to justify seeking assistance from other than agency staff? A strong showing of need may in fact impact on the resolution of the first issue, that is, the authority to contract out the service (*e.g.* inherent authority).

3. What procedures and restrictions (such as compensation limits) apply to the hire? This requires statutory analysis, examination of trans-agency and agency-specific rules in addition to examination of the type of relationship created by the contract.

The discussion that follows focuses first on the crucial distinction between "personal" and "nonpersonal" services, which distinction is in essence another way to phrase the employee/independent contractor dichotomy. These distinctions largely determine whether a particular relationship is subject to OPM or OFPP jurisdiction. Statutes authorizing the hiring of attorneys as "employees" are examined in this part.

Then attention turns on the standards for determining whether an agency should exercise its discretion to obtain the services of non-governmental personnel where they will serve as independent contractors or otherwise.

Finally the procurement procedures mandated by statute and regulation that apply to personal and nonpersonal service contracts, particularly those of relevance in the area of attorney services, are outlined in general terms.

A. The Personal/Non-Personal Distinction

An "employee" within the meaning of the civil service laws is a person:

(1) appointed or employed in the civil service by a Federal officer or employee performing in an official capacity;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) supervised and directed by a Federal official or employee.[44]

In determining whether a person should be considered an "employee," the Civil Service Commision (now the Office of Personnel Management) adopted the so-called "Pellerzi Standards" and "Mondello Supplement."[45] When the relationship between the government and the service provider becomes that of employer/employee, a contract for such services is denominated "personal."

The Federal Acquisition Regulation (FAR) succinctly explains the situation as follows:

> a personal service contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has

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[44] 5 U.S.C. § 2105(a) (1982). See also FEDERAL PERSONNEL MANUAL, Chap. 304 at 304-3.

[45] See generally Lodge 1858, Am. Fed. of Gov't Emp. v. Webb, 580 F.2d 496, 499-500 (D.C. Cir. 1978). For a restatement of these standards, see text at notes 51-52 infra.

> specifically authorized acquisition of the services by contract.[46]

Differentiating between "personal" and "non-personal" services in concrete settings poses significant difficulties for procurement officials.[47] An employee-employer relationship may occur either as a result of the contract's terms or the manner of its administration during performance.[48] The key question in each case is whether the contractor's personnel are subject to the "relatively continuous supervision and control" of a Government officer or employee.[49] Each contractual arrangement must be assessed in light of its own circumstances.[50]

The FAR lists various elements which are considered in determining whether an employer-employee relationship has been established.[51] Of the six listed, at least three seem to be particularly relevant in the area of attorney services:

> (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
>
> (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
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> . . .
>
> (6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to--

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[46] 48 C.F.R. § 37.104(a) (1986).

[47] See generally Lovitky, The Problems of Government Contracting for Consulting Services, 14 Pub. Cont. L.J. 332, 341 (1984); Byers, Recognizing Personal Services Contracts, D.A. Pam. 27-50-121.

[48] 48 C.F.R. §§ 37.101, 37.104(c)(1) (1986).

[49] Id. § 37.104(c)(1) (1986). See also Lodge 1858, Am. Fed. of Gov't Emp. v. Webb, 580 F.2d at 504.

[50] Id. § 37.104(c)(2) (1986).

[51] Id. § 37.104(d). See also Lovitky, supra note 47, at 341-2.

(i) Adequately protect the Government's interest;

(ii) Retain control of the function involved; or

(iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.[52]

With regard to the services of attorneys in the conduct of litigation, the element listed last (6) would appear to be particularly implicated, though no one factor may be dispositive in finding that services are personal.[53] For example, as will be noted below, the 1986 Debt Collection Amendments authorize the retention of private attorneys to collect non-tax indebtedness owed the federal government.[54] The legislative history and the executive interpretation of the law[55] emphasize the need for substantial control over the efforts of these contractors.

As Professor Rotunda has observed,[56] while an attorney possesses a certain degree of autonomy in performing services for a client, there is a considerable area subject to client control. The more sophisticated the client the more likely control will (and perhaps should) be exercised. The federal government is obviously such a sophisticated "client." Where an attorney is asked for more than his legal opinion and where the actions which he takes based on his judgment will have a direct impact on members of the general public, as a matter of good administrative policy (and also in recognition of constitutional concerns) close supervision and control by the agency would appear to be called for in many instances. This would seem to be particularly true in the area of litigation where historically the government and public interests at stake have counselled in favor of a concentration of authority in the Department of Justice.[57]

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[52] Id. § 37.104(d)(3), (4), (6). The other elements mentioned are performance on site (1), tools and equipment furnished by the government (2), and the need for the type of service can be expected to last beyond one year (5). Id.

[53] See text at note 50 supra.

[54] See text at notes 223-24 infra.

[55] See text at notes 246-68 infra. See also Burns Letter, supra note 42 ("Moreover, it is intended that there will be close, day-to-day supervision of such private counsel . . . .").

[56] See Rotunda, Ethical Problems in Federal Agency Hiring of Private Attorneys, 1 Geo. J. Legal Ethics 85, 111-116 (1987).

At the same time, there are several opinions by the General Accounting Office which discuss consulting contracts for legal services and classify the arrangements as non-personal. A "consulting" contract is one calling for services of an advisory nature.[58] In one case it was found by the GAO that government supervision of the attorney's performance would not be required due to the lawyer's extensive knowledge of the field.[59] In another, where a legal opinion was solicited regarding the scope of the agency's authority, the Comptroller General found that:

> . . . the [agency] requested an end product--a legal review of its authority and a determination of the extent of its independence from [the parent agency]--and it was the responsibility of the law firm to determine how best to achieve the desired goal. This necessarily required the law firm to perform its own research and to conduct an independent "unsupervised" legal analysis.[60]

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[57] See 5 U.S.C. § 3106 (1982) and 28 U.S.C. §§ 516, 518, 519, 547(2) (1982) and Burns Letter, quoted note 42 supra. By their terms these statutes forbid an agency's litigating on its own regardless of whether the person litigating is a full-time employee or otherwise. While statutory exceptions to the norm are contemplated, the general thrust of these statutes concentrating litigation in DOJ, given their policy, would seem to be to require clear statutory authorization for an agency's hire of outside counsel for litigation. (This mirrors the approach to personal services contracting: specific statutory authority is required. See text at note 63 infra. This, however, is primarily intended to protect the integrity of government personnel regulation.)

As will be noted below, however, agencies differ in the degree to which they view close control of private litigators necessary and, even within the same agency, differing degrees of control may be exercised depending on the nature of the case. See text at notes 357-80, 404-08, 430-32 infra.

[58] See, e.g., 48 C.F.R. § 37.201 (1986).

[59] 53 Comp. Gen. 702 (1974).

[60] 61 Comp. Gen. 69, 73 (1981).

See also Comptroller General's opinion in B-133381, July 22, 1977 (unpublished). In this case, the International Trade Commission was found by the Civil Service Commission to be in violation of CSC's rules as a result of its organization. The ITC General Counsel initiated the CSC inspection. The ITC thereafter

Viewing matters in that way suggests that many consulting contracts for legal services would be deemed "non-personnel."[61]

Where an attorney is employed in more than a purely "advisory" capacity, as where he or she drafts contracts, negotiates real estate transactions or otherwise acts on behalf of the government in dealing with third persons, the major decisions must presumably be the agency's. These instances may fall somewhere between contracts for litigation services and those for

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voted to appeal the CSC report. It contracted with two private attorneys to prepare a statement for submission to the CSC over the signature of the ITC chairman stating the views of the ITC regarding the CSC report and to prepare a memorandum to the ITC explaining the work done and items in the report which were found objectionable and those which were found not subject to objection.

The Comptroller General found on the basis of the apparently limited information available that:

1. the ITC had sufficiently demonstrated the need to contract for the services because its Office of General Counsel had initiated the investigation and therefore, the ITC needed an "independent" judgment;

2. 5 U.S.C. § 3109 along with the ITC appropriation act was the grant of relevant contracting authority;

3. the services performed were not within the statutory jurisdiction of the Department of Justice; and

4. the relationship established as a result of the contract was, as far as could be determined from the information available, not that of employer/employee, but purely contractual.

While only the last cited finding of this Comptroller General opinion is relevant to the topic discussed in the text, it highlights the general types of issues that must be confronted in dealing with any procurement problem in the legal services area. The topic encompassed by finding (1) is discussed in text at notes 84-105 _infra_, finding (2) in text at notes 63-83 _infra_, and finding (3) in text at notes 104-05 _infra_.

[61] _See_ Lovitky, _supra_ note 47, at 344. _But see_ GAO opinion in Matter of Navaho and Hopi Indian Relocation Commission, B-114868.18 (Feb. 10, 1978) (unpublished) (if attorney serves as general counsel, supervision necessary may create personal services contract).

merely legal advice in terms of the amount of supervision and control that should be called for.[62]

Because of the impact on the scheme of civil service regulation, agencies must rely on "specific" statutory authorization in order to justify the award of a personal services contract, whether for legal services or others.[63] This requirement for "specificity" may arguably be satisfied in a variety of ways. For example, a statute may authorize the agency to establish an employee/employer relationship by expressly empowering the agency to enter into "personal service" contracts. Such is the case with the Veterans' Administration,[64] though the statute does not refer to any particular type of services, thus raising the question whether it encompasses legal services, or more specifically, the power to conduct litigation.[65]

Some statutes expressly empower the agencies to use private attorneys to conduct litigation, though they do not on their face classify the services to be rendered as "personal." Where it is contemplated by Congress that the attorneys retained under the authority of these provisions will be subject to close agency supervision and control, such statutes may also satisfy the requirement for "specific" statutory authorization necessary to exempt the hire from all or part of the scheme of OPM regulation.[66] Both the 1986 Debt Collection Amendments[67] and perhaps another Veterans' Administration statute may fall into this category. The latter provides in part:

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[62] As with litigation, though, different types of cases may call for different treatment in terms of the degree of control exercised.

[63] 48 C.F.R. § 37.104(b) (1986). Needless to say, whether a statute is "specific" in the relevant sense may often be a debatable issue. Presumably this rule mirrors the assumption that if Congress wants to exempt a hire from otherwise applicable personnel regulation, it says so clearly.

[64] 38 U.S.C. § 231 (1982).

[65] Regarding this latter inquiry, the statutes vesting litigation authority in the Department of Justice "except where statutes otherwise provide" must be considered. _See_ note 57 _supra_.

[66] Of course the extent to which the hire, if it creates an employee/employer relationship, is subject to or partially exempt or fully exempt from the civil service regime is a question of statutory construction. _See_ text at notes 106-17 _infra_.

[67] _See_ text at notes 246-68 _infra_.

> [With the concurrence of the Attorney General of the United States], the Administrator may acquire the services of attorneys, other than those who are employees of the Veterans' Administration, to exercise [the right of the United States to bring suit in court to foreclose a loan made or acquired by the Administrator and to recover possession of any property acquired by the Administrator]. The activities of attorneys in bringing suit under this section *shall be subject to the direction and supervision of the Attorney General* and to such terms and conditions as the Attorney General may prescribe.[68]

Moreover Congress has enacted a statute, 5 U.S.C. § 3109,[69] which permits the head of an agency to "procure by contract" the

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[68] 38 U.S.C. § 1830(a) (1982) (emphasis added). Both statutes might be construed as grants of authority to enter into either personal or non-personal service contracts, within the discretion of the agency.

[69] 5 U.S.C. § 3109 (1982) which provides in relevant part:

> (b) When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to--
>
> > (1) the provisions of this title governing appointment in the competitive service;
> >
> > (2) chapter 51 and subchapter III of chapter 53 of this title [5 U.S.C. §§ 5101 *et seq.*, §§ 5331 *et seq.*]; and
> >
> > (3) section 5 of title 41 [41 U.S.C. § 5], except in the case of stenographic reporting services by an organization.
>
> However, an agency subject to chapter 51 and subchapter III of chapter 53 of this title [5 U.S.C. §§ 5101 *et seq.*, §§ 5331 *et seq.*] may pay a rate for services under this section in excess of the daily equivalent of the highest rate payable under section 5332 of this title [5 U.S.C. § 5332] only when specifically

temporary (not in excess of one year) or intermittent personal services of experts and consultants or an organization thereof without regard to the statutes governing appointment in the competitive civil service. This authority is "triggered" only by some other statute, including an appropriation. What happens in practice apparently is that this other statute expressly refers to Section 3109. An example is the Department of Defense 1983 Continuing Appropriations Act which provided in part:

> During the current fiscal year, the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force, respectively, if they should deem it advantageous to the national defense, and if in their opinions the existing facilities of the Department of Defense, are inadequate, are authorized to procure services in accordance with Section 3109 of title 5, United States Code, under regulations prescribed by the Secretary of Defense[70] . . . .

The Comptroller General has interpreted Section 3109 to authorize appointment to the excepted civil service,[71] though in accordance with the procedural formalities applicable to civil service appointments.[72] The authority is limited to the services of "consultants"[73] and "experts,"[74] but contemplates that the persons or organizations retained can perform work of a type

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> authorized by an appropriation or other statute authorizing the procurement of the services.
>
> (c) Positions in the Senior Executive Service may not be filled under the authority of subsection (b) of this section.

[70] Pub. L. No. 97-377, sec. 703, 96 Stat. 1830, 1849.

[71] Lovitky, supra note 47, at 333.

[72] Id. at 334. See generally FEDERAL PERSONNEL MANUAL, Chap. 304, Employment of Individual Experts and Consultants.

[73] Consultants function in a purely advisory capacity. Lovitky, supra note 47, at 336. See also 48 C.F.R. § 37.201 (1985).

[74] "Experts" are utilized in a primarily operational capacity. Lovitky, supra note 47, at 336.

normally provided by persons in the regular civil service.[75] Agreements calling for the performance of personal services by consultants may, therefore, be obtained under the authority of Section 3109 in conjunction with a specific appropriation act.[76]

The FAR itself expressly acknowledges that Section 3109 qualifies as a statutory authorization for personal service contracting.[77] Therefore, it would seem that where an attorney will function as an "expert" or "consultant" within the meaning of Section 3109 in furnishing legal services to an agency, the classification of the contractual relationship as "personal" will not necessarily be fatal where there is the requisite appropriation or other statutory authorization which triggers Section 3109. This assumes, of course, that the particular appropriation or other statute can be construed to encompass services of a legal nature.

Where the legal services at issue are deemed "non-personal," the agency can rely on "general contracting authority" to justify their procurement.[78] In this regard it should be noted that Section 3109 has also been interpreted as a statutory grant of authority to secure services (including legal services) by "contract or appointment" where the triggering appropriation is present.[79] However, in this context it is also limited to the services of experts and consultants.[80]

Where contracting authority, whether general or specific, is present, a finding that a contract is "non-personal" means that the firm or individual retained is deemed to be an "independent contractor."[81]

Finally, it is worth noting that a statutory grant of contracting authority may not be required, at least in all instances, to justify the retention of attorneys, whether as consultants, experts or otherwise, where they function as independent contractors. The courts have recognized the inherent power of the executive branch of government to enter into procurement contracts,[82] though presumably Congress could at least to some degree limit this authority if it did so clearly.[83]

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[75] Id. at 333-4.

[76] Id. at 334.

[77] 48 C.F.R. § 37.104(b) (1986).

[78] Id. § 37.102(d).

[79] See, e.g., Boyle v. United States, 309 F.2d 399, 401 (Ct. Cl. 1962). See also 61 Comp. Gen. 69 (1981); GAO opinion in Matter of Navaho and Hopi Indian Relocation Commission, B-114868.18 (Feb. 10, 1978) (unpublished).

[80] See 5 U.S.C. § 3109 (1982).

[81] See 61 Comp. Gen. 69 (1981).

B. Standard for Procurement

Where a contract is classified as calling for personal services, the specific statutory authority required to justify the procurement must initially be consulted to ascertain the standard (if any) to be applied in determining when the agency can retain attorneys as experts, consultants, or otherwise.[84] Moreover, where personal consulting services are involved, the Federal Acquisition Regulation[85] specifies that an agency may contract for them only "when essential to the agency's mission"[86] and the services may "not unnecessarily duplicate any previously performed work or services."[87]

With respect to non-personal services, examination of any relevant statutory authority for the contracting would similarly be called for. As in the case of personnel services, any agency developed standards must be consistent with these.[88] But even without statutory guidance, the FAR mandates that the agency consider the "relative costs of Government and contract performance . . . where Government performance is practicable."[89] "In no event may a contract be awarded for the performance of an inherently governmental function."[90] With respect to non-personal consulting services, the FAR imposes the same acquisition

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[82] Lovitky, supra note 47, at 339. See, e.g., United States v. Tingey, 30 U.S. (5 Pet.) 115, 127 (1831); United States v. Salon, 182 F.2d 110, 112 (7th Cir. 1950); United States v. Maurice, 36 F. Cas. 1211, 1216-17 (No. 15747) (C.C.D. Va. 1823).

[83] Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 582, 635-38 (1951) (Jackson, J., concurring).

[84] See, e.g., text at note 70 supra.

[85] 48 C.F.R. Parts 1-51 (1985). See text at notes 186-94 infra.

[86] 48 C.F.R. § 37.204(b) (1986) (emphasis added).

[87] Id. § 205(b)(1).

[88] See, e.g., text at note 331 infra.

[89] 48 C.F.R. § 37.102(c) (1986). This seems to apply also to personal service contracting. See generally id. § 37.102.

[90] Id. § 37.102(b). OMB Circular No. A-76 (Rev. Aug. 4, 1983) states in part:

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> b. Retain Governmental Functions In-House. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.
>
> . . .
>
> e. A Governmental function is a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Governmental functions normally fall into two categories:
>
> > (1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services, activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.
> >
> > (2) Monetary transactions and entitlements, such as tax collection and

standards as it does in the case of personal consulting contracts.[91]

The General Accounting Office has indicated that, where Congress has not provided otherwise, with regard to legal services of a non-personal nature the agency must determine that contracting out is "more feasible, more economical, or necessary to the accomplishment of the agency's task."[92] "Thus, where an agency has employees available, whether attorneys or not, to perform a particular task, it should not contract for performance of the same task. Each agency is responsible for determining in each case, whether the particular services could be performed by agency employees."[93]

In one case the agency retained an attorney to provide legal assistance necessary to an appeal because its General Counsel's Office had previously advocated the opposing position. The Comptroller General determined that in these circumstances a sufficient showing of need had been made.[94] The same result obtained in another case where an advisory commission used a law firm to research the parameters of its legal authority after its parent agency had offered its own opinion on the same subject. Specifically, that later opinion related to the extent of the contracting agency's independence from the parent agency. An alleged conflict of interest tainted the first opinion and justified a request for another view.[95]

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> revenue disbursements; control of the treasury accounts and money supply; and the administration of public trusts.

Arguably certain legal services, including litigation of some types, might fit this description in certain circumstances, though Attachment A to the Circular does include a category, "legal/litigation studies."

[91] 48 C.F.R. § 37.204(b) (1986). See text at notes 86-87 supra.

[92] See 61 Comp. Gen. 69 (citing earlier opinions) (consulting services at issue here).

[93] GAO opinion in B-133381, July 22, 1977 (unpublished).

[94] Id. See note 60 supra.

[95] See 61 Comp. Gen. 69. The Comptroller General there reiterated its opinion, expressed on other occasions, that the pay limits found in 5 U.S.C. § 3109(b), see note 69, supra, applied

When it comes to consulting services, whether of a personal or non-personal nature, the FAR permits contracts to obtain, for example, "specialized opinions or professional or technical advice not available within the agency or from another agency"[96] and "outside points of view, to avoid too limited a judgment on critical issues."[97] Agencies may not, however, contract for consulting services where the contracts involve the performance of "work of a policy-making, decision-making, or managerial nature that is the direct responsibility of agency officials,"[98] will "bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures,"[99] "specifically aid in influencing or enacting legislation,"[100] or afford "preferential treatment to former Government employees."[101] While such activities are forbidden for "consulting contracts," it is not clear whether classification of a contract as other than one for consulting services may avoid some of these restrictions,[102] as for example, if the contract could be considered one for "expert" services under 5 U.S.C. § 3109.[103]

Finally, it should be noted that even where there is apparent authority to enter into a services contract, whether personal or non-personal and whether for consulting or other services, and a sufficient showing of need for the services can be made, there may be other statutes that have to be examined in order to determine whether Congress has in fact forbidden the contracting out attempted.[104] Examples of such statutes are the various

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only to consultants serving by appointment and not as independent contractors. Id. at 77.

[96] 48 C.F.R. § 37.204(b)(1) (1986).

[97] Id. § 37.204(b)(2).

[98] Id. § 37.204(c)(1).

[99] Id. § 37.204(c)(2).

[100] Id. § 37.204(c)(3).

[101] Id. § 37.204(c)(4).

[102] Such as id. § (c)(1).

[103] See note 69 supra.

[104] See, e.g., 61 Comp. Gen. 69, 73-4 (1981).

provisions in the United States Code[105] which largely reserve the power to litigate on behalf of the United States to the Department of Justice.

C. Procurement Procedures

1. The Personal/Non-Personal Distinction

Since personal services contracts must be based on "specific" statutory authorization,[106] such authorizing legislation must initially be consulted in order to determine what procedures and restrictions, if any, Congress intended to accompany obtaining of the services.

Several examples are of particular interest here. The Federal Election Commission is authorized to "appoint" counsel to represent it in certain types of litigation.[107] Such appointments are "without regard to the provisions of title 5, United States Code, governing appointments in the competitive service" and the compensation may be fixed "without regard to the provisions of chapter 51 and subchapter III of Chapter 53 of such title."[108] The Comptroller General may apply to the district courts to enforce its subpoenas "by counsel whom he may employ without regard to the provisions of title 5 governing appointments in the competitive service, and the provisions of chapter 51 and subchapters III and IV of Chapter 53 of such title, relating to classification and General Schedule pay rates."[109] A final example is Section 3109 of Title 5 which authorizes the appointment of legal consultants "without regard to . . . the provisions of this title governing appointment in the competitive service . . . [and] chapter 51 and subchapter II of chapter 53 of the title" but subject to certain compensation limits.[110]

Where a statute uses the term "appointment," the position may likely fall within the regulatory jurisdiction of the OPM. Such is apparently the case with regard to FEC counsel. The grant of authority to the Comptroller General is similar. On the other hand, Section 3109 of Title 5 uses the phrase, "procure by contract" which on first glance suggests that the experts and consultants retained are to be independent contractors. However the fact that by the terms of Section 3109 such contracts are exempt from both certain civil service provisions[111] and from procurement advertising requirements[112] has been relied upon to support an interpretation of this statute as a grant of both appointment and procurement authority,[113] the former subject to OPM and the latter to OFPP jurisdiction.[114] With regard to the 1986 Debt Collection Amendments, and perhaps the similar Veterans' Administration authority referred to previously,[115] it could be argued that while Congress intended that supervision should be close, even to the point of creating what otherwise could be considered a personal services contract, the contracts were to be considered subject only to the procurement regime.[116] Alternatively Congress may have assumed that the contracts would be subject to both OPM and OFPP regulations to some degree. (Or Congress may never have considered the potential for OPM jurisdiction.)

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[105] See 5 U.S.C. § 3106, 28 U.S.C. §§ 516, 518(b), 519, 547(2) (1982).

[106] See text at note 63 supra.

[107] 26 U.S.C. § 9010 (1982). See also id. § 9040; 2 U.S.C. § 437c(f)(4)(B) (1982).

[108] 26 U.S.C. § 9010(a) (1982).

[109] 42 U.S.C. § 1320a-4(b) (1982).

[110] 5 U.S.C. § 3109(b) (1982). See generally Lovitky, supra note 47, at 338.

Outside of those instances where statutes indicate that the hire is subject exclusively to civil service or other regulation, personal service contracting would seem to be subject to the requirements of the Competition in Contracting Act or to both that statute and some regulation by the OPM.[117] The FAR expressly contemplates that the competition requirements which it lays down, which to a great extent mirror the CICA, apply to all services

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[111] 5 U.S.C. § 3109(b)(1), (2).

[112] Id. (b)(3).

[113] See Lovitky, supra note 47, at 333-4.

[114] Id. at 334, 337-8.

[115] See text at notes 67-68 supra.

[116] Under these two statutes, if they authorize "personal service" contracts, it is a "nice" question whose employees the attorneys would be: Justice's or the agency relying on the collection services.

See also 15 U.S.C. § 634(b)(7) (SBA power to procure attorney services by contract for loans); 39 U.S.C. § 409(d) (With prior consent of the Attorney General, the Postal Service may employ attorneys by "contract or otherwise to conduct litigation . . . .") (emphasis added) (This may be a grant of both appointment and procurement authority.); 42 U.S.C. § 3211 (Secretary of Commerce may procure attorney services by contract for loans).

[117] The Office of Personnel Management has adopted a set of instructions applicable to the retention of experts and consultants in positions excepted from the competitive service by statute or by the OPM. FEDERAL PERSONNEL MANUAL, chap. 304.

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These apply to appointments under, inter alia, 5 U.S.C. § 3109. They also apply to individual expert or consultant services procured by contract if an employer-employee rather than an independent contractor relationship is created. Id. 1-1(a).

An agency considering hiring an expert or consultant would obviously be concerned with the restraints and conditions thus imposed. They may suggest that structuring the contractual relationship with the service provider as that of an independent contractor is the preferable course to take.

It may, therefore, be helpful to summarize the significant parts of these instructions:

1. "Intermittent appointments can be renewed from year to year . . . temporary appointments cannot," though there are exceptions. Id. 1-3(c).

2. "While persons appointed under . . . Section 3109 are excepted from the position classification and General Schedule grade and pay laws, section 3109 states that agencies otherwise subject to those laws generally may pay up to the daily equivalent of the highest rate payable under the General Schedule; . . . that rate is limited to the rate payable for level V of the Executive Schedule. The Comptroller General has held that highest rate payable is the top step of grade GS-15." Id. 1-6(a).

3. "Because experts and consultants generally are paid on a daily rate basis, they are not entitled to more than the daily rate prescribed in the appointment documents for each day of service regardless of the number of hours worked." However, "an expert or consultant, employed on a daily basis may be paid the rate of basic compensation for work on days outside the prescribed tour of duty, provided compensation within any biweekly pay period does not exceed the rate of basic pay for level V of the Executive Schedule." Id. 1-6(e).

4. Experts and consultants hired as employees are employees within the coverage of the Fair Labor Standards Act, though most experts and consultants are exempt from the minimum wage and overtime pay provisions. Id. 1-6(f).

5. Unless the hiring agency otherwise provides, an expert or consultant is not entitled to a pay increase on the basis of an increase in the General Schedule. Id. 1-6(g).

6. "Unless the appointment documents expressly provide for holiday pay, an expert or consultant employed on a per diem basis

contracts, whether personal or nonpersonal, unless a statute

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is not entitled to compensation for holidays on which no work is performed." Id. 1-6(h).

7. "Certain former members of the uniformed services are subject to reduction in retired pay if employed in the Federal service." Id. 1-6(2)(i).

8. "An expert or consultant who serves intermittently may be allowed travel or transportation expenses." Id. 1-6(k).

9. "An expert or consultant . . . who serves on an intermittent or other basis without a prearranged regular tour of duty does not earn annual and sick leave [but one who is on] a regularly prescribed tour of duty does earn such leave." Id. 1-7(a).

10. "An expert or consultant whose service is intermittent or temporary for one year or less is not covered under the civil service retirement system and is ineligible for life insurance and health benefits." Id. 1-7(b).

11. Statutory prohibitions on conflict of interest apply to many experts or consultants as "special government employees." Id. 1-9. See also FEDERAL PERSONNEL MANUAL Chap. 735, Appendix C.

12. "Experts and consultants who serve as employees are subject to the same conditions and restrictions which apply to other Federal employees who are in the excepted service and who work on a temporary or intermittent basis." Chap. 304, 1-10(a).

13. "Each proposed appointment (and extension of appointment) must be reviewed and certified by a high agency management official in terms of," inter alia, the need for the position, the correctness of judgment that the position requires an expert or consultant, the qualifications of the proposed appointee, and the appropriateness of the intended level of pay. Id. Appendix A, A-1(a).

14. A suitable certification attesting that all the requirements listed in item 13 have been met must be prepared and signed by the certifying official. Id. A-1(c).

15. "Agencies are required to maintain effective controls over use of appointees during employment." Such control includes frequent reviews, generally quarterly, to assure that in each case the duties performed are still those of an expert or consultant, time limits are being observed, documentation is kept current, and duties of records are actually being performed. Id. A-2(a).

otherwise requires.[118] Moreover, the CICA applies by its terms to contracting for "services" and makes no express distinction between personal and non-personal services.[119] In fact, there is

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16. Each quarterly review is to be documented and the record retained for OPM examination. Id. A-2(c).

17. "For each expert or consultant employed, full-time or part-time or intermittently, whether employed by appointment or by contract, . . . each agency must establish an Official Personnel Folder" to contain designated documents, including a description of the position, a description of the appointee's background and qualifications, a Standard Form notification of personnel action showing the employment, and a standard form showing termination of the employment, a certification that a statement of employment and financial interests has been obtained and it had been determined that no conflict of interest exists. Id. A-4(a).

18. The agency should obtain form each expert and consultant a statement of employment and financial interests at the time of formal employment. Id. A-4(b).

19. Employing agencies must report their employment actions to OPM on designated forms. Id. A-5.

Some expert and consultant contracts may be subject to regulation by both the OMP and OFPP. See id. chap. 304, 1-10. Attorneys providing other than expert or consultant services but still considered "employees" may be subject in part to restrictions similar to those detailed above or others within the jurisdiction of the OPM. It should be noted, however, that even full-time attorney positions are exempt from important parts of the civil service regime, most importantly the competitive examination system and many of the tenure protection provisions.

[118] 48 C.F.R. § 37.105 (1986).

[119] See 41 U.S.C. § 253(a)(1). Technically, the 1984 CICA was an amendment to the Federal Property and Administrative Services Act of 1949. See Pub. L. 98-369, § 2711(a)(1), 98 Stat. 1175. The declaration of purpose of the latter statute indicated an intent to encompass only "non-personal" services, see 40 U.S.C. § 471(a), which it defined as "contractual services, other than personal and professional services." See 40 U.S.C. § 472(j). See also 40 U.S.C. § 481(a)(1). This gives rise to an argument that the CICA is limited to "non-personal" services and apparently some officials so view it.

Other officials do not agree, as is evidenced by the FAR, and they would seem to stand on higher ground on this issue. The CICA refers to "services" generally. It would be an odd bit of no reason inherent in the distinction between personal and non-personal service contracts that requires a finding that they should be treated differently with regard to competitive procedures.

Prior to the 1984 Act, the GAO had clearly indicated that procurement of non-personal services pursuant to Section 3109 was subject to general federal procurement regulations.[120] Nothing in the CICA expressly changes that result.

2. Legal Services

The Competition in Contracting Act of 1984 applies to "services,"[121] without any distinction as to type, such as professional or non-professional,[122] attorney or accountant. In fact Section 2753 of the Act[123] mandated a study and the development of recommendations regarding how to "increase the opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of professional, technical, and management services."[124] This provision suggests that the drafters of the Act intended that it apply to professional services, which attorneys services clearly are.[125]

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drafting to define "non-personal services" at one point and intend that any time the term "services" is used it is meant to refer to "non-personal services." Such drafting would directly undermine the usefulness of a definitional section. In fact, prior to CICA, the Federal Property and Administrative Services Act contained an exemption from its advertising requirements for "personal or professional services," see 41 U.S.C. § 252(c)(4) (1982), which exemption was not continued in express terms by the CICA.

[120] See 61 Comp. Gen. 69, 78-9 (1981) (citing prior opinions). This opinion dealt with legal services. See also Lovitky, supra note 47, at 338-9.

[121] 41 U.S.C. § 253(a)(1).

[122] See also note 119 supra.

[123] P.L. 98-369, sec. 2753, 98 Stat. 1203.

[124] Id. (emphasis added).

[125] The Conference Committee noted:

> The conference substitute requires the Office of Federal Procurement Policy to recommend to Congress a plan for increasing the use of full and open competition in the

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> procurement of professional, technical and managerial services. This category of procurements often involves the use of evaluation criteria, other than price, in the selection of the winning vendor.
>
> The Office of Federal Procurement Policy is directed to recommend competitive selection procedures for procurements where price is not a significant factor and the agency has determined a legitimate need for the best or highest quality proposal. Such a plan should include requirements for the agencies to follow to ensure that all responsible vendors are allowed to compete for the above procurements and that fair and reasonable prices are paid for the service. OFPP should consider, as a possible alternative prior to designing a plan, a system in which all qualified persons capable of providing specified services are placed on a list maintained by the government, in which each of those persons is encouraged to submit a competitive proposal in response to each solicitation for such services, and in which the award is made to the bidder on the list who can perform the service for the lowest overall cost.
>
> The Office of Federal Procurement Policy should also, in conducting the study, consult with experts in such fields as soil engineering, real estate appraising, surveying and mapping, and other professional services which do not fit within the traditional concept of Federal procurement procedures.

Deficit Reduction Act of 1984, H. Rep. 98-861, 98th Cong., 2d Sess. at 1438 (1984). See also H. Rep. 98-1157, 98th Cong. 2d. Sess. at 28 (1984).

These Reports demonstrate that Congress in 1984 realized that in obtaining professional services price should not always be the sole basis for choice but that the problems in obtaining such services on a competitive basis might justify special procurement procedures.

Moreover, given the concerns underlying the legislation[126] there is no reason to think that Congress in 1984 intended to exempt legal services from the purview of CICA. Nothing in the legislative history expressly supports such an exemption. In fact, in passing the Debt Collection Amendments of 1986, Congress expressed its view that the CICA applied to attorneys services, at least in the litigation context.[127] If it applies there, it is difficult to believe that Congress would distinguish between litigation and non-litigation services with regard to procurement procedures.

Finally, prior to the enactment of the CICA, the GAO clearly found that at least in the context of non-personal attorney consulting contracts entered into pursuant to 5 U.S.C. Section 3109, federal procurement requirements applied.[128]

Thus where there is a contract for services, the applicability of the CICA is not affected by the fact that it is attorney services which are being procured, at least where public funds are used to pay the bills. Where any attorneys retained will be paid from non-appropriated funds,[129] it might be argued that at least some of the concerns prompting the passage of the Act are not implicated and the agency need not comply with the CICA.[130] Since, however, the possibility of favoritism is present even where public funds are not at stake and such favoritism impacts adversely the public's view of its government, there are some good reasons not to construe the statute so restrictively. In fact the construction of the CICA as applicable to non-appropriated funds is supported by the fact that in enacting the 1986 Debt Collection Amendments Congress indicated both that CICA applied to the contracting for legal services there authorized *and* that contingency fees (i.e. non-appropriated funds) would be the usual mode of payment for attorneys retained.[131]

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[126] See note 130 infra and text at note 135 infra.

[127] See text at notes 278-92 infra.

[128] 61 Comp. Gen. 69, 78-79 (1981). See generally Lovitky, supra note 47, at 338-9.

Prior to the 1984 Act, professional services contracts, including those under § 3109, were exempt from advertising. See 5 U.S.C. § 3109(b)(3) (1982); 41 U.S.C. § 5 (1982); 41 U.S.C. § 252(c)(4) (1982). After the 1984 Act the advertising requirements of Section 5 do "not apply to the procurement of property or services [made] by an executive agency pursuant to this subchapter [the CICA]." 41 U.S.C. § 260 (1982). That legal services may be exempt from advertising under 41 U.S.C. § 5 (as amended in 1983) as professional services does not, however, establish that they are exempt from the CICA. Exemptions from the latter must be "express." See 41 U.S.C. § 253(a)(1) (Supp. III 1985).

The 1984 Act further provides that "[a]ny provision of law which authorizes an executive agency . . . to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this chapter relating to procedures other than sealed-bid procedures." 41 U.S.C. § 260 (Supp. III 1985). This provision has obvious reference to 5 U.S.C. § 3109, see id. § 3109(b)(3), and arguably confirms the continued viability of 61 Comp. Gen. at 78-79.

3. *Competition in Contracting Act*[132]

In 1984 Congress amended the Federal Property and Administrative Services Act[133] and the Armed Services Procurement Act.[134] It had determined that two of their principal shortcomings were their failure to "give proper accordance to negotiation as a legitimate competitive procurement procedure" and to "adequately restrict the use of noncompetitive negotiation."[135]

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[129] As in the case of the Federal Deposit Insurance Corporation. *See* text at notes 336-38 *infra*.

[130] *See*, *e.g.*, Sen. Rep. No. 98-297, 98th Cong. 1st Sess. at 3 (1983): "The last, and possibly the most important, benefit of competition is its inherit appeal of 'fair play.' Competition maintains the integrity in the expenditure of *public funds* by ensuring that government contracts are awarded on the basis of merit rather than favoritism." (emphasis added.)

By its terms the FAR applies only to the use of appropriated funds. *See* 48 C.F.R. §§ 1.103, 2.101 (1986). This may, however, merely reflect the fact that the statutory procurement counterpart to the CICA in the defense area is made expressly applicable only to services "for which payment is to be made from appropriated funds." 10 U.S.C. § 2303(a) (Supp. III 1985). It is significant that the CICA lacks such a provision.

[131] *See* text at notes 234-40 and 278-87 *infra* (though, of course, the loans recovered here may have originally come from appropriated funds). However, payment of expenses of suit such as filing fees will apparently come out of appropriated funds. *See Legal Times*, Vol. IX, No. 36, Mon., Feb. 16, 1987 at 1 ("Private Lawyers See Riches in Federal Debt Collection").

[132] Pub. L. 98-369; 98 Stat. 1175, July 18, 1984.

[133] 41 U.S.C. §§ 251 *et seq.* (1982).

[134] 10 U.S.C. § 2301 *et seq.* (1982).

The focus of the following discussion of the new requirements applicable to procurement, which were adopted to solve these problems, is on procurement in the civilian sector, though similar procedures apply to military procurement.[136] Even here, there are some provisions of the CICA which appear largely irrelevant to procurement of attorneys services[137] or whose application in that context is likely to be rare.[138] Such provisions will not be discussed. Moreover, the analysis will attempt to give a general overview of the statute, rather than probe its subtleties.

Except as otherwise expressly authorized by another statute[139] or by various provisions contained in the CICA

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[135] See, e.g., H. Rep. 98-861, 98th Cong. 2d Sess. at 1421 (1984). See generally Cohen, The Competition in Contracting Act, 14 Pub. Cont. L.J. 1 (1983).

[136] See 10 U.S.C. §§ 2301 et seq. (Supp. III 1985).

[137] See, e.g., 41 U.S.C. § 253b(f) (Supp. III 1985) (planning solicitation for award of a development contract for a major system).

[138] See, e.g., id. § 253d (delivery of technical data).

[139] Section 252(a) mandates that "executive agencies" make contracts for services in accordance with Sections 251 et seq. See 41 U.S.C. § 252(a) (1982). It provides, however, that those sections do not apply "when this chapter is made inapplicable pursuant to section 474 of Title 40 or any other law." Id. See also Andrus v. Glover Const. Co., 100 S. Ct. 1905, 1911 n.19 (1981) (reading § 252(a)(2) "to refer exclusively to statutory provisions that . . . in express terms exempt procurements from §§ 251 through 260 of Title 41 or from the FPASA in its entirety.") Section 253(a)(1) basically reiterates this by specifying, inter alia, that "except in the case of procurement procedures otherwise expressly authorized by statute," executive agencies must procure services through "full and open competition." Id. § 253(a)(1) (Supp. III 1985). In short, in the civilian procurement area, the competitive scheme of the CICA applies unless another statutory clearly provides otherwise.

Section 252(a) further indicates that when the CICA "is made inapplicable by any such provision, section 5 . . . of this title [41 U.S.C. § 5 which requires advertising for proposals] shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title." 41 U.S.C. § 252(a)(2) (1982). One of the statutes referred to in the last clause of Section 252(a)(2) is 5 U.S.C. § 3109 (Supp. III 1985). See note 69 supra for the full text of itself,[140] executive agencies[141] conducting a procurement for

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the latter provision. However, Section 260 of the CICA further provides:

> Sections 5, 8 and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this chapter. Any provisions of law which authorize an executive agency (other than an executive agency which is exempted from the provisions of this chapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this chapter relating to the procedures other than sealed-bid procedures.

41 U.S.C. § 260 (Supp. III 1985). The last sentence of Section 260 thus clearly indicates that when 5 U.S.C. § 3109 is relied upon as a source of procurement (not appointment) authority, the competitive procurement procedures of the CICA *may* ("shall be construed to authorize," not require) be followed. Moreover since Section 3109 purports to be merely an exemption from 41 U.S.C. § 5 and not from §§ 251 *et seq.*, procurement of services under Section 3109 is subject to the CICA.

In short unless a statute otherwise provides, CICA applies in the civilian sector to the procurement of services. Where a statute clearly makes CICA inapplicable, procurement of services is subject to the advertising requirements of 41 U.S.C. § 5--unless there is a statutory exception to that provision. Section 3109 is a statutory exception to § 5 but not §§ 251 *et seq.*

[140] *See, e.g.*, 41 U.S.C. § 253(b), (c), (g) (Supp. III 1985).

[141] *See* 41 U.S.C. § 252(a) (1982). The term, "executive agency" *is* not defined in Section 259 of the Act which is the definitional provision. *See* 41 U.S.C. § 259 (Supp. III 1985). It is, however, defined in 40 U.S.C. § 472 and that definition has been taken to be applicable to the competition provisions. *See, e.g.*, Flight International Group, Inc. v. Federal Reserve Bank of Chicago, 583 F. Supp. 674, 679-80 (N.D. Ga. 1984).

Section 472(a) provides that the term "executive agency" means "any executive department or independent establishment in the executive branch of the government, including any wholly owned services are required to "obtain full and open competition"[142] and "use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement."[143] The term, "full and open competition," means

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government corporation." 40 U.S.C. § 472(a) (1982). The FAR is in accord. See 48 C.F.R. § 2.101 ("executive department, military department, or any independent establishment within the meaning of 5 U.S.C. §§ 101, 102 and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. § 846 (sic § 9101)."). See also 41 U.S.C. § 403(1) (Supp. III 1985).

The executive departments are defined in 5 U.S.C. § 101 (1982) to include State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy and Education. [However, the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration are expressly exempt from 41 U.S.C. §§ 252 et seq. though similar procurement provisions apply to them under 10 U.S.C. §§ 2301 et seq.] Under 5 U.S.C. § 104 (1982), an "independent establishment" is "an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment" and the GAO. But see Flight International Group, Inc. v. Federal Reserve Bank of Chicago, 583 F. Supp. at 679 n.4 (rejecting that the meaning of "independent establishment" in Section 472(a) necessarily is defined by 5 U.S.C. § 104). A "government corporation" is a corporation owned or controlled by the government of the United States. 5 U.S.C. § 103 (1982). The distinction between a "mixed-ownership Government corporation" and "a wholly owned Government corporation" is drawn in 31 U.S.C. § 9101 (1982) by a specific identification of which government corporations fall into these two categories. For example, the FDIC and Federal Home Loan Banks, the National Credit Union Administration Central Liquidity Facility are designated as "mixed ownership." The FSLIC and Pension Benefit Guaranty Corporation are "wholly owned."

Significantly for present purposes, it would therefore appear that except to the extent statutes otherwise provide, the so-called "independent agencies," such on the FTC, and the wholly owned government corporations, like the FSLIC and PBGC, are subject to the CICA, at least with regard to certain of their functions.

[142] 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985).

[143] Id. § 253(a)(1)(B). Congress has indicated that "a fair proportion of the total purchases and contracts for property and

that all responsible sources are permitted to submit competitive proposals on the procurement.[144]

While sealed bids constitute one type of competitive procedure sanctioned (and sometimes required) by the statute,[145] it is probably not required in the case of procurement of attorneys services since in most, if not all instances, such contracts will not be made solely on the basis of price and other price-related factors.[146] Therefore a request for competitive proposals (RCP) will be the requisite method of competitive procurement.[147]

The statute provides seven general exceptions from the requirements of full and open competition and use of competitive procedures.[148] Three appear to be of more than passing relevance with regard to legal services contracts:

> (1) the property or services needed by the executive agency are available from only

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services for the Government shall be placed with small-business concerns." 41 U.S.C. § 252(b) (Supp. III 1985). "Competitive procedures" within the meaning of the CICA include "procurements conducted in furtherance of . . . . 15 U.S.C. § 644 . . . as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete." 41 U.S.C. § 259(b)(4) (Supp. III 1985). Finally, the CICA expressly provides that an "executive agency may provide for the procurement of property or services covered by [Section 253] using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of Title 15." 41 U.S.C. sec. 253(b)(2) (Supp. III 1985).

The regulations of the Small Business Administration include "legal services" as a category of "small business" where the size of the business concern is not more than § 3.5 million in annual receipts. 13 C.F.R. § 121.2 (1986). The FAR itself contains regulations for procurement as it affects small businesses, see 48 C.F.R. Part 19 (1986), but it appears to impose a $2 million cap on receipts of a provider of legal services in order to qualify as "small." Id. § 19.102-5.

[144] Id. 41 U.S. §§ 259(c), 403(7) (Supp. III 1985).

[145] Id. § 253a(a)(2)(A).

[146] Id. § 253(a)(2)(A)(ii). See note 125 supra.

[147] Id. § 253(a)(2)(B).

[148] Id. § 253(c).

> one responsible source and no other type of property or services will satisfy the needs of the executive agency;[149]
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> (2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals.[150]
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> . . .
>
> (7) the head of the executive agency-
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> (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and
>
> (B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.[151]

Even where exemption (2) applies, the agency is required to "request offers from as many potential sources as is practicable under the circumstances."[152] Moreover an agency may not award a contact using procedures other than competitive procedures based on exemptions (1) or (2) unless the contracting officer justifies the action in writing and certain approvals are obtained.[153] If, however, exception (2) is relied upon, the required justification and approvals may be made after the contract is awarded.[154] The format for the justification is prescribed.[155] The statute requires, in part, that the agency expressly determine that the anticipated cost will be fair and reasonable.[156] It is not permissible to justify the use of procedures other than competitive procedures "on the basis of the lack of advance planning."[157]

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[149] Id. § 253(c)(1). Where, for instance, in the geographical area where the services are to be rendered, only one lawyer or firm has the necessary expertise, this section may be applicable. As Appendix A to this Report indicates, this exception has in fact been relied upon by agencies in obtaining legal services.

[150] Id. § 253(c)(2).

[151] Id. § 253(c)(7)(A), (B).

[152] Id. § 253(e).

[153] Id. § 253(f)(1).

[154] Id. § 253(f)(2).

The language of the exemptions and the procedures that accompany their use suggest that they should be only sparingly invoked.[158] With regard to attorneys' services, they would appear to be of relatively limited use.[159]

There is one additional exemption from the requirement that agencies "obtain full and open competition though the use of competitive procedures" that might be significant from the point of view of legal services contracts. Specifically, in the case of contracts for an amount which does not exceed $25,000,[160] the statute authorizes the adoption of "special simplified procedures"[161] "[i]n order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors."[162] However in using these procedures, an agency must "promote competition to the maximum extent practicable."[163] Further discussion of those procedures will be postponed until the examination of the FAR.[164]

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[155] Id. § 253(f)(3).

[156] Id. § 253(f)(3)(C). The justification must also include a description of the agency's needs, identification of the exception relied upon, a demonstration based on the contractor's qualifications or nature of procurement of the reasons for using the exception, a description of the market survey conducted or reasons why it was not conducted, a listing of sources expressing interest in procurement, and a statement of actions the agency may take to remove barriers to competition in the future. Id. § 253(f)(3)(A), (B), (D), (E), (F). This justification must be available for public inspection. Id. § 253(f)(4).

[157] Id. § 253(f)(5)(A).

[158] See Ruttinger, Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking, 1986 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS at 881 (". . . the market surveys, sole source determinations, and gamut of agency approvals required by Parts 6 and 7 of the FAR may make it difficult for an agency to proceed on a sole source basis in a timely fashion.").

[159] See text at notes 416-19 infra.

[160] 41 U.S.C. § 253(g)(2).

[161] Id. § 253(g)(1).

[162] Id.

The CICA requires that each solicitation for competitive proposals (other than for small purchases) must at a minimum include a statement of all significant factors, including price, which the agency expects to consider in evaluating the proposals, along with the relative importance assigned to each of those factors.[165] In the case of competitive proposals, there must be "a statement that the proposals are intended to be evaluated with and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors."[166] The time and place for submission of proposals must also be included in the solicitation.[167] Specifications included in the solicitation must be developed "in such a manner as is necessary to obtain full and open competition with due regard to the nature of the . . . services to be acquired."[168]

Except where one of the exemptions from the use of competitive procedures is applicable,[169] agencies intending to solicit proposals for a contract for services for a price expected to exceed $10,000 must furnish the Secretary of Commerce a notice for publication in the Commerce Business Daily.[170] Among other things, this notice must accurately describe the services contracted for.[171] If interested in submitting a proposal, a prospective contractor can then make a business judgment whether to request a copy of the solicitation.[172] Where these notices are required, agencies are limited with respect to the time when they may issue a solicitation and with regard to setting deadlines for the submittal of proposals.[173]

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[163] Id. § 253(g)(4). See also Ruttinger, supra note 158, at 888-95 for a discussion of various specific procurement techniques that may [or may not] be applicable to obtaining attorney services--small purchases, indefinite supply contracts, basic ordering agreements, blanket purchasing agreements and supply schedules.

[164] See text at notes 192-94 infra.

[165] 41 U.S.C. § 253a(b)(1)(A), (B).

[166] Id. § 253a(b)(2)(B)(i).

[167] Id. § 253a(b)(2)(B)(ii).

[168] Id. § 253a(a)(1)(C). In preparing for the procurement the agency must also "specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition," and "use advance procurement planning and market research." Id. § 253a(a)(1)(A), (B). Each solicitation must include specifications which permit full and open competition and "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law." Id. § 253a(a)(2)(A), (B). The type of specification shall depend "on the nature of the needs of the executive agency and the market available to satisfy such needs." Id. § 253a(a)(3).

[169] Id. § 416(c)(2). [Exemption (1) (sole source) to Section 253 is not exempt from the notice requirements. See id. § 416(2).] See also id. § 416(3) (no notice if determination it would not be "reasonable" or "appropriate" to issue it).

The statute requires the agency to evaluate competitive proposals based solely on the factors specified in the solicitation.[174] It may reject all proposals if the agency head determines that such action is in the public interest.[175]

The agency has the discretion to have discussions with offerors with regard to their proposals prior to any award.[176] If it chooses to do so, it must conduct discussions, oral or written, with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.[177] Or the agency can award the contract without such discussions "when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the . . . service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government."[178] Unless all proposals are rejected, the agency must award the contract with

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[170] Id. § 416(a)(1).

[171] Id. § 416(b)(1).

[172] Id.

[173] Id. § 416(a)(3).

[174] Id. § 253b(a). See GAO opinion in Matter of Wolf, Block, Schorr and Solis-Cohen, B-221363.2 (May 28, 1986) (unpublished) (contract award protest rejected on basis that while the protester promised a lower price, technical qualifications of another proposal justified award to another law firm).

[175] Id. § 253b(b). There are also provisions for "qualification requirements" (designed for quality assurance) that might perhaps apply to the legal services area. Id. § 253(c).

[176] Id. § 253b(d)(1).

[177] Id. § 253b(d)(2). In retaining attorneys, such pre-award discussion would appear to be a likely occurrence.

[178] Id. § 253b(d)(1)(B).

"reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only price and the other factors included in the solicitation."[179] A "responsible source" means a prospective contractor[180] who, inter alia, "has a satisfactory performance record,"[181] "a satisfactory record of integrity and business ethics,"[182] and who "has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills."[183]

In addition the statute regulates the types of contracts that may be executed[184] and requires that any contract awarded expressly permit examination of the relevant books and records of the contractor by the GAO.[185]

4. Federal Acquisition Regulation.

The Federal Acquisition Regulation which is found in title 48 of the Code of Federal Regulations, chapter 1,[186] is prepared, issued and maintained jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration under their respective statutory authorities.[187] It applies to acquisitions of property and services by contract with appropriated funds.[188] By its terms, therefore, this system of regulations would appear to be inapplicable in the case of executive agencies in those instances where attorneys' fees are paid out of the funds collected.[189] Such may be the case with respect to the 1986 Debt Collection Amendments pursuant to which contingency fee agreements may be utilized and are in fact the preferred fee arrangement.[190] For current purposes the contents of the FAR largely repeat the statutory requirements for competitive procurement described above and need not be repeated here.[191]

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[179] Id. § 253b(d)(4).

[180] Id. §§ 259(c), 403(8).

[181] Id. § 403(8)(C).

[182] Id. § 403(8)(D).

[183] Id. § 403(8)(E). It has been estimated that the full competition process consumes a minimum of two to three months. See Ruttinger, supra note 158, at 879. See also text at notes 206, 420 infra.

[184] Id. § 254(a), (b).

[185] Id. § 254(c).

[186] 48 C.F.R. ch. 1 (1986).

[187] Id. § 1.102(b). Agencies may, within limits, issue acquisition regulations that implement or supplement the FAR. Id. § 1.301(a)(1).

[188] Id. § 2.101.

The procedures for so-called "small purchases," that is, acquisitions of services in the amount of $25,000 or less, apply only to non-personal services contracts.[192] For purchases not over $1,000 a purchase may be made without securing competitive quotations if the contracting officer considers the price to be reasonable.[193] For contracts in excess of that amount, there is a requirement of solicitation of quotations from a reasonable number of sources in order to promote competition to the maximum extent practicable.[194]

5. OFPP's Study of Professional Services Contracting.

Section 2753 of the Competition in Contracting Act of 1984 directed that not later than January 31, 1985, the Administrator of the Office of Federal Procurement Policy

> complete a study of alternatives and recommend to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives a plan to increase the opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of professional, technical, and managerial services.[195]

The study[196] was completed on schedule and transmitted to Congress. While legal services were considered to be

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[189] But see note 131 supra.

[190] See text at notes 237-40 infra. But see note 131 supra.

[191] See, e.g., 48 C.F.R. Part 6 (1986).

[192] Id. § 13.000, 13.101.

[193] Id. § 13.106(a)(1).

[194] Id. § 13.106(b)(1).

[195] Pub. L. 98-369, 98 Stat. 1203.

[196] OFPP, STUDY OF PROFESSIONAL SERVICES CONTRACTING (Jan. 1985) (hereinafter "OFPP Study").

"professional services" within the meaning of the statute,[197] "the associations of many professions, including . . . law . . . did not submit comments or participate in the proceedings of the study."[198] The final report suggests that this apparent lack of interest might have been attributable to satisfaction with the present contracting process.[199]

In summarizing its findings, the report noted that those private organizations participating in the study identified what they believed were various problems prevalent in the contracting practices of many government agencies:[200]

(1) the tendency of price to dominate in the contractor selection process;[201]

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[197] OFPP Study, Appendix C at 35.

[198] *Id.* at 3.

[199] *Id.*

[200] Notes 201-06 *infra* extensively cite from the OFPP Study because of the background information dealing with government contracting contained therein that is relevant generally to the legal service area as well as for the observations that may be specifically relevant to the hiring of outside counsel.

[201] *Dominance of Price*

Traditionally, the preferred method of procurement within Government has been formal advertising. Under the formally advertised, sealed bid method, the work to be performed is described in sufficient detail to permit award to the lowest, responsive, responsible bidder without pre-award discussions. Price is the sole criterion for selecting a contractor from among the responsive, responsible bidders.

In service contracting, pre-award discussions are generally considered necessary, because it is difficult to develop a sufficiently detailed description and understanding of the work to be performed to permit award of a contract without discussion. The procurement regulations provide for pre-award discussions and the use of "the negotiated method of procurement" where sufficiently detailed specifications cannot be developed to permit formal advertising.

The negotiated method of procurement, in addition to permitting discussions, permits contract award to be based on factors other than price. Price, in terms of dollars, however, is easily understood and simple to apply as a selection criteria. One of the recurring criticisms received from the private sector during the course of the study was that the Government tends to "take the easy way out" and accept low-priced offers rather than

(2) the difficulty of developing good statements of work;[202]

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justify the acceptance of higher-priced, technically superior ones.

The tendency of price to be a dominant factor in selecting a professional service contractor is a longstanding issue. In 1972, Congressman Jack Brooks recognized the ingrained nature of price competition in Government procurement and sponsored and guided into law H.R. 12807 (now Public Law 92-582--The Brooks A-E Selection Statute). The statute effectively prohibits the selection of architects-engineers for Government work on the basis of price competition.

The controversy over the respective roles of "price" and "technical merit" as factors influencing the selection of a contractor to perform professional services has continued during the 12 years since the enactment of P.L. 92-582. Competition and price competition are often thought of as synonymous. Competition is fundamental to Federal procurement, and even though the procurement regulations encourage technical competition, it is perceived by many that the spirit in which the regulations are implemented often stresses price. This has caused problems in professional services contracting, and the Government is sometimes accused of being "penny-wise and pound-foolish" when it accepts offers primarily on the basis of price.

OFPP STUDY at 4.

[202] Poor Statements of Work

The definition of the work to be performed under a service contract is crucial. If the work is not properly defined and described, the result will be a misunderstanding and controversy. Unfortunately, there is no universal method for writing high quality statements of work. Each statement must be tailored to the particular task to be performed and the quality level of services required. Some tasks lend themselves to explicit definition; others are best described in terms of mission need or performance requirements.

The statement of work is a part of the contract and is binding on both the contractor and Government. Since the written words in the statement translate into cost and profit, poorly written statements may create misunderstandings and lead to adversary or unproductive relationships between the Government and its contractors. Some contractors offering comments on the study indicated there is no such thing as a perfect statement of work. These contractors state that the only way the Government can

(3) the use of procedures that result in technical leveling;[203]

(continued from previous page)

protect itself and be assured of obtaining the best value is to negotiate the exact task to be performed (not how it will be performed) after a contractor is selected. Otherwise, the contractors maintain, gamesmanship will occur.

The form of gamesmanship alluded to by the contractors purportedly occurs when a contractor spots a flaw, omission, or ambiguous term in the statement of work, but does not mention it until after the contract has been awarded. If the contractor spotting the flaw or omission is awarded the contract, the problem is then brought to the attention of the Government, and a change order is required. The contractor, then, has the opportunity to "get well" on the change order, as competition no longer exists.

In any event, the Government's best protection against the occurrence of gamesmanship is to express the services to be performed in clear, simple, and legally-enforceable terms. In all situations, however, the Government is, to a certain extent, dependent on the professionalism of the contractor performing the task. There is no method totally effective in preventing gamesmanship. Industry spokesmen suggested that circulation of draft work statements would help improve the overall quality and specificity of the statements. Government personnel indicated that detailed discussions of the statement of work during negotiations, when coupled with thorough cost analysis, examination of a contractor's past performance, and the establishment of negotiated ceilings on certain cost elements, were generally adequate to protect the Government from possible gamesmanship and from the problem of buy ins. . . .

OFPP STUDY at 5.

[203] Technical Leveling

Section 15.610 of the FAR defines technical leveling as, "helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal."

Although prohibited by the FAR, technical leveling was, perhaps, the most frequent complaint received from the private sector during the course of this study. One of the organizations testifying at the September 13, 1984, public meeting described technical leveling as:

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> Technical leveling . . . typically occurs in a negotiated procurement situation where technical portions of proposals are initially evaluated and scored, along with the cost proposals. After the initial evaluation and scoring, there ensues a process (commonly referred to as discussions, negotiations, or offer clarification) where the technical scores are converged to the point where at least the top two or three proposals are not only in a competitive range, but very close, often separated by only a few points on a scale of 100. This results in a level profile of technical proposals within the competitive range which, *de facto*, shifts the attention to cost as the factor to determine the ultimate selection. Cost, in turn, is often "low-balled" or simply unrealistic in terms of the nature of the service requirement.
>
> The combination of the technical leveling and the consequent shift to cost as the award determinant is bureaucratically and politically compelling; that is, source selection authorities and source evaluation board members find it difficult to not simply take the safe course of action, which is to select the low bid if it can be rationalized as "realistic."
>
> The net effect of the above process for the Government manager seeking highest quality is truly perverse: he or she is forced to accept a source who may be *just qualified*, as opposed to a source who is demonstrably the *best qualified* and *most competent* and most likely to perform satisfactorily against demanding high quality requirements; and he or she often faces a significant possibility of a cost overrun and/or serious performance shortfall.

In considering technical leveling, as described above, it must be kept in mind that a legitimate role of negotiations is to clarify ambiguities and identify deficiencies in the proposals of all offerors having the potential to receive an award so that the offerors are given an opportunity to meet the Government's requirements. In those instances when discussions result in the elimination of technical problems, the Government is often justified in making an award, based on cost, between equally satisfactory proposals.

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In May 1984, the General Accounting Office (GAO) issued a decision (B-212675) involving Harrison Systems Ltd., who protested the award of a contract by the United States Information Agency. The contract was for the design and installation of a studio control room and technical operations facilities. The decision illustrates the complexity and subtlety of the judgments required to prevent technical leveling and, at the same time, protect the Government. In its decision, GAO ruled:

> Even though the solicitation states that technical factors will be weighted 70 percent and price 30 percent, and award will be made to the offeror with the highest combined point total, the agency may properly award to a lower technically rated, lower priced offeror with lower combined point total because the contracting officer made a reasonable determination that there was no significant technical differences between the proposals and award to the lower priced offeror was most advantageous to the Government, notwithstanding that there was a 14.4 percent difference in the technical scores of the highest scored offeror and the offeror receiving the award.

GAO had previously issued decisions on both sides of the issue regarding a contracting officer's discretion in implementing the award criteria specified in the solicitation. In an RCA Service Company decision (B-202871), August 22, 1983, GAO ruled that:

> "Even where the RFP evaluation factors indicated that award would be made to that offeror with the highest point score, we have held that before the contracting agency can award to the highest priced (or higher cost) technically superior offeror, the contracting agency is required to justify such award in the light of the extra expenditure required."

In its Telecommunications Management Corporation decision, 57 Comp Gen 251, 1978, GAO indicated that:

> Where the solicitation sets forth a precise numerical evaluation formula, including price, and provides that the awardee will be selected

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> on the basis of total score, the contracting agency must award to the highest scored offeror if the source selection official agrees with the scoring.

GAO, in issuing B-212675, acknowledged that the RCA and Telecommunications Management Corporation decisions were "somewhat inconsistent." GAO summed up its views by stating:

> While we think that both cases were decided correctly, the relevant statements went beyond what was necessary to decide the cases. We now think that both views are too extreme. The better view, which we adopt, is that when the RFP contains a precise numerical evaluation formula, including cost/price, and a statement that award will be made to the highest point scored offerors, the contracting officer or other source selection authority retains the discretion to examine the technical point scores to determine whether a point differential between offerors represents any actual significant difference in technical merit. If it does not, then award may be made to the lower cost or priced proposal, even though its total point score is lower. In effect, the contracting official would be rescoring the technical proposals conceptually, but not mechanically, and would not really be altering the predetermined cost/technical tradeoff. If, however, the source selection official determines that the point difference represents actual technical superiority and he agrees with the scoring, then he must abide by the formula and award to the offeror with the highest total point score. He may not decide that the technical superiority is not worth the cost difference. That would alter the predetermined cost/technical tradeoff. Additionally, we think that if the award is to be made to a more expensive higher total point scored offeror in accordance with the formula, there is no necessity for the contracting agency to make a separate determination that the extra expense is justified, since that determination is made when the formula is devised.

OFPP STUDY at 7-9.

(4) the lack of cost realism and the occurrence of "buy-ins;"[204]

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[204] Buy Ins

Buy ins may occur in service contracting, as in other types of contracting, when a contractor knowingly understates the estimated cost and, therefore, the proposed contract price. This may be done in expectation of obtaining the proposed contract and then increasing the price through change orders or during follow-on contracts. Buy ins also occur, however, in certain instances, when a contractor is attempting to "break into" the market. These contractors are sometimes willing to take an initial contract at cost, or even at a loss, in order to establish a performance record for future contracts.

Evaluating proposals received in response to a service requirement and ascertaining whether the proposed work can be performed for the offered price is sometimes difficult. The capability of offerors to meet the Government's needs is based almost entirely on information submitted by the offerors, each of whom has a vested interest in obtaining the proposed contract. The equipment, facilities, and personnel capabilities required to perform some services can be evaluated with some certainty. The performance of many services, though, requires intellectual skills and creativity. It is difficult, at best, to estimate, with the same certainty, the knowledge an offeror's personnel possess, the value of that knowledge, or how the personnel will use their expertise to efficiently and effectively perform a task or service.

Several persons and organizations suggested that past performance on comparable contracts (particularly with regard to cost realism) is the best way to judge an offeror's probability of performing in the future. They recommended that past performance carry "more weight" in selecting contractors for future work and that Government personnel be given specific training in evaluating price proposals.

Acceptable past performance, of course, is based on a contractor's past history of performing the required tasks at the desired quality level, on time, within budget, and in conformance with all contractual requirements. A contractor who has performed in this manner in the past will "have a good track record." That does not mean, however, that new offerors may not also perform well or even better. It, also, does not mean that good track records should not be discounted when the purchasing official has a reasonable basis to believe they no longer accurately reflect the offeror's ability or willingness to perform.

OFPP STUDY at 6.

(5) the shortage of highly trained contracting personnel;[205] and

(6) the length of time required to award a contract.[206]

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[205] Need for Better Trained Personnel

In addition to revealing the complexities involved in developing and administering criteria for awarding professional services contracts, GAO's ruling in B-212675 indicates that contracting is not an exact science or a mechanical process. Trained contracting personnel are essential to maintaining the delicate balance required within the system between sufficient operating flexibility to protect the Government's interests and the structure required to maintain its integrity.

Contracting, whether for services or hardware, requires the exercise of sound judgment. There is no substitute for skilled, competent personnel. Trained personnel will often succeed in obtaining a good contract, notwithstanding the constraints imposed by the contracting methodology employed. Conversely, untrained personnel may produce an unworkable contract, notwithstanding an effective contracting process.

Several major organizations commented that the current problem in professional services contracting stems from attitudes of the personnel doing the contracting and not necessarily from inadequate regulations or procedures. Training in professional services contracting was stressed as a means of altering the perception attributed to many contracting personnel that, rightly or wrongly, the "low offer is always the best and safest."

OFPP STUDY at 9-10.

[206] Long Procurement Lead Times

Procurement administrative lead time (PALT) is generally regarded as the total time required to process a procurement action, beginning with the time a procurement request is received in the procurement office and ending with the award of the contract. Industry and Government officials, both, acknowledge that the procurement cycle, "simply takes too long." The Professional Services Council reported that, in their members' experience: (1) it usually takes a year between the drafting of a scope of work and the award of a contract; and (2) it almost always takes from 4-6 months for an agency to award a contract after receipt of proposals. Problems occurring as a result of the long processing times include: higher prices because of built-in escalation factors; difficulty of scheduling and retaining key personnel; a change in requirements over time; and a reduction in the number and quality of competing firms.

Of course, it is possible that the same or similar problems exist in the area of government procurement of legal services. The lack of complaints by the legal contracting sector during the study may have reflected either satisfaction or simply ignorance that the study was proceeding.

The Government contracting community apparently was largely satisfied with the existing contracting process[207] and agency representatives to the OFPP task group did not agree with industry perceptions regarding the pervasiveness of the problems noted above.[208] "Contracting officials stated that current procedures provide for the proper consideration of both cost and technical factors and that contract award can now be made on the basis of technical and quality factors when appropriate to do so."[209] Apparently the OFPP study had little generative significance in the contracting area.

IV. Debt Collection Amendments of 1986

A. Introduction

On November 3, 1986 President Reagan approved Pub. L. 99-578 which establishes a pilot program for the retention of attorneys engaged in private practice in an effort to collect the non-tax indebtedness owed to the United States. In enacting this legislation Congress addressed various issues that are relevant outside the area of debt collection. For that reason, detailed consideration of the new statute and its legislative history is required.

As of September 30, 1985 non-tax delinquent debts owed the the federal government had grown to $23.6 billion, double the $11.7 billion reported outstanding in fiscal year 1981.[210] Without litigation to recover these amounts it was estimated that $6.7 million was lost each day due to the running of the statute of limitations.[211] Under existing law judicial enforcement of

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OFPP STUDY at 10.

[207] Id. at 3.

[208] Id.

[209] Id. at vii.

[210] S. Rep. No. 99-256, 99th Cong. 2d Sess. 2 (1986) (hereinafter "S. Debt Report").

[211] Id.

claims fell to the Department of Justice[212] which, given other matters deemed to be of higher priority,[213] allegedly lacked the resources to mount an effective debt collection campaign in the courts.[214] Moreover since efficient and effective debt collection was believed to require some experience with debtor psychology and techniques to avoid payment as well as knowledge of state laws with regard to post-judgment remedies,[215] employment of private counsel appeared to Congress to be a viable alternative method of collection.[216] Testimony at hearings held on the legislation indicated that several states had utilized the services of private attorneys for debt collection with considerable success.[217]

The legislation that was enacted as the "Debt Collection Amendments" originated in the Senate where hearings were held by the Subcommittee on Energy, Nuclear Proliferation, and Government Processes of the Committee on Governmental Affairs. The full Senate approved the committee reported bill without amendments on March 19, 1986.[218] Similar bills were considered in the House by the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary. The full committee reported a bill which was adopted by the House without amendment on September 29, 1986.[219] Some relatively minor differences between the bills passed by the Senate and House were resolved when the Senate voted to accept the House version on October 8, 1986.[220] The President approved the bill on November 3, appending, however, a signing statement regarding his interpretation of the legislation.[221]

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[212] See 5 U.S.C. §§ 3106; 28 U.S.C. §§ 516, 518(b), 519, 547 (2) (1982).

[213] See H. Rep. No. 99-909, 99th Cong. 2d Sess. 4 (1986) (hereinafter "H. Debt Report"); S. Debt Report at 2, 3.

[214] H. Debt Report at 4; S. Debt Report at 3.

[215] Hearing Before the Subcommittee on Energy, Nuclear Proliferation, and Government Processes of the Senate Committee on Governmental Affairs on S. 209 (Federal Debt Recovery Act of 1985), 99th Cong. 2d Sess. (hereinafter "1986 Sen. Hearings") 92 (statement of William Guice III) (1986).

[216] See S. Debt Report at 6.

[217] 1986 Sen. Hearings at 35-83.

[218] 132 Cong. Rec. S2989 (daily ed. March 19, 1986).

[219] Id. H8563, 8569 (daily ed. September 29, 1986).

[220] Id. S15616 (daily ed. October 8, 1986).

The enacted legislation amends Section 3718 of title 31 of the United States Code.[222] Prior to the 1986 amendments, that provision authorized the head of an executive or legislative agency to make contracts with collection agencies to recover indebtedness owed to the United States Government.[223] Now those same officials "may, subject to the approval of the Attorney General, refer to a private counsel . . . claims of indebtedness owed the United States arising out of activities of that agency."[224] Referral is, however, limited to private counsel retained by the Attorney General pursuant to contracting authority expressly granted and conditioned by the new legislation.[225]

For a variety a reasons, including presumably a concern for the abuses that might arise in its administration, the legislation is limited in a variety of ways which demonstrate the character of the program as experimental only. First of all, the new act is effective for only three years, which period is to commence on the effective date of implementing regulations adopted by the Justice Department.[226] Those regulations are mandated by the legislation and must be submitted to Congress at least 60 days before they become effective.[227] Congress did not expressly specify a date by which such regulations must be issued. However, it did require that within 180 days of the enactment of the new legislation, the Attorney General submit to Congress a report of the actions taken under his new contracting authority.[228] This might be taken to suggest an assumption by Congress that the implementing regulations would be in place no later than that date.

The other significant limitation is not temporal but geographical. The contracting authority can be exercised to obtain legal services in not more than ten federal judicial districts.[229] While part of the new legislation appears to vest the Justice Department with total discretion whether or not to exercise its new authority,[230] it was apparently contemplated that Justice would in fact exercise it in at least five districts.[231]

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[221] 22 Weekly Compilation of Presidential Documents 1464 (Nov. 3, 1986), reprinted in 1986 U.S. CONG. AND ADMIN. NEWS 5619.

[222] 31 U.S.C. § 3718 (1982 and Supp. II 1983).

[223] Id. § 3718(a).

[224] Sec. 1(4), Pub. L. 99-578 (adding subsection 3718(b)(2)).

[225] Id.

[226] Sec. 5, Pub. L. 99-578.

[227] Sec. 4, Pub. L. 99-578.

[228] Sec. 2, Pub. L. 99-578.

B. Program Detail

1. Services Covered. The Attorney General may make contracts with private counsel "to furnish legal services, including representation in negotiation, compromise, settlement and litigation."[232] While the literal language of the statute could be construed to cover legal services that do not arise directly from or are not directly related to litigation, the clear focus of the legislation was on permitting the retention of attorneys for pursuing collection efforts in the courts.[233]

2. Contract Terms.

a) Fees. Each contract is to include "such terms and conditions as the Attorney General considers necessary and appropriate."[234] One of the most important of these relates to the compensation paid attorneys who are hired. Contracts must specify "the amount of the fee to be paid . . . or the method for calculating that fee"[235] and "may provide that a fee a person charges . . . is payable from the amount recovered."[236] The statutory language thus indicates that contingency fees are authorized but not necessarily required in all instances.[237] However the legislative history indicates that in the debt collection area payment is generally by contingent fee[238] and Congress expected that in all, or almost all, instances such a fee arrangement would be the prescribed method of compensation.[239] The prospect of collection of money owed the government without substantial taxpayer cost[240] proved particularly alluring.

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[229] Sec. 3, Pub. L. 99-578.

[230] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(1)(A)).

[231] Sec. 3, Pub. L. 99-578. The five districts initially chosen encompass Miami, Los Angeles, Detroit, Houston and New York. Legal Times, Feb. 16, 1987, Vol. IX, No. 36.

[232] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(1)(A)).

[233] See, e.g., S. Debt Report at 2-4.

[234] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(1)(A)).

[235] Id.

[236] Sec. 1((2), Pub. L. 99-578 (amending and redesignating subsection 3718(b)).

[237] See also H. Debt Report at 6 ("Such contracts could be made on a fixed fee or contingent basis.").

At the same time the statute directs that "the amount of the fee payable . . . may not exceed the fee that counsel engaged in the private practice of law in the area or areas where the legal services are furnished typically charge clients for furnishing legal services in the collection of claims of indebtedness . . . ."[241] Among other things this provision would seem to mean that in an area where collection attorneys are not paid on a contingency basis and the fee charged under the fee structure prevailing there would be less than that paid under a contingency contract, the Attorney General can (and must) make a fee arrangement in accordance with the local practice.[242]

The statute gives no guidance as to how to identify the "typical fee." Since competitive procedures will be utilized to award these contracts, the proposals themselves may be some evidence of the "typical fee" in the area, but it would be difficult to justify reliance solely on those. Some additional investigation, such as a letter survey of a substantial portion of the local collection bar and inquiries directed to local bar associations, would appear to be minimal steps necessary to give some clear guidance on this matter.

The legislation does, however, indicate that differences in fees charged by the same attorney for different claims can be justified on the basis of "the amount, age, and nature of the indebtedness and whether the debtor is an individual or a business entity."[243] This language suggests that the factors thus enumerated are the only ones that can be used to support differentials in fees charged for the collection of different debts. The assumption seems to be that these are factors that generally enter (or should enter) into the calculation of the "typical fee" of a collection attorney.

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[238] See, e.g., H. Debt Report at 5.

[239] See S. Debt Report at 7; H. Debt Report at 5.

[240] There may be some taxpayer cost to the extent filing, service and other fees and costs of suit must be advanced from appropriated funds and are not ultimately recovered from the debtor. See note 131 supra.

[241] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(1)(A)).

[242] Also if the debt instrument provides for the debtor's payment of attorneys fees, the government's attorneys can collect their compensation along with the debt at no cost to the government. S. Debt Report at 7. Contracts with counsel should anticipate that possibility and limit attorney compensation accordingly.

Congress apparently expected that Justice would write contracts with particular attorneys to cover not just one claim but a large number.[244] In fact the testimony at the subcommittee level suggested that the economies of debt collection and facilitation of supervision of attorneys' work argued in favor of using few rather than many attorneys or firms.[245] On the assumption, therefore, that a contract under the new act covers a multitude of debts which vary considerably in amount, age, and nature of the claim and debtor it is likely that, even where only contingent fees are provided for, the provisions regarding fees charged are likely to be rather complicated where in fact the "typical" practice of attorneys in the area is to vary fees based on such factors.

b) Control. Maintenance of control by the federal government over the activities of private counsel taken pursuant to these contracts was obviously a matter of highest import for Congress in drafting this legislation.[246] Moreover, President Reagan in signing the legislation indicated that he did so "knowing that the Attorney General will take all steps necessary to ensure that any contract entered into with private counsel contains provisions requiring on-going supervision of the private counsel so that all fundamental decisions, including whether to initiate litigation and whether to settle or compromise a claim, are executed by an officer of the United States, as required by the Constitution."[247]

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[243] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(1)(A)).

[244] See, e.g., S. Debt Report at 7; Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary (hereinafter "House Hearings") 79 (1986) (statement of Deputy Assistant Attorney General Robert Ford).

[245] See, e.g., S. Hearings at 80 (statement of Dr. Dolores Cross).

[246] Concerns regarding control and the constitutional problems thereby implicated, see text at notes 8-15, supra have been voiced regarding this program. See Legal Times, Feb. 16, 1987, Vol. IX, No. 36 ("Private Lawyers See Riches in Federal Debt Collection").

For statements in the legislative history indicating the assumption that close control was expected see, e.g., H. Dept. Rep. at 4 ("In granting this [contract] authority to the Attorney General, the Committee emphasizes the importance of the protection it has included in the bill to ensure its proper use"); 132 Cong. Rec. S.2986 (Sen. D'Amato) ("Under the careful supervision of DOJ, and subject to provisions which would protect the rights of debtors, the use of private counsel will greatly enhance the ability of the Federal Government to recover outstanding debt.") (emphasis added).

The legislation requires that contracts permit the Attorney General "to terminate either the contract or the private counsel's representation . . . in particular cases if the Attorney General finds that such action is for the convenience of the Government."[248] Another mandated contractual provision retains for the head of the agency referring a claim the authority "to resolve a dispute regarding the claim, to compromise the claim, or to terminate a collection action on the claim."[249] Monthly reports will have to be submitted by counsel to the Justice Department and the federal agency referring the claim relating to the services rendered during the month and the progress during the month in the collection efforts.[250]

While the statute expressly vests the power to enter into these contracts for legal services in the Attorney General, subdelegation within the Justice Department of the contracting power is apparently permitted.[251] Whether the Attorney General can delegate it not to his subordinates but to other federal agencies is less clear. The legislative history itself focuses on the Justice Department's involvement in the contracting process and this suggests a negative answer. Realistically speaking, the chance that Justice would want to delegate the power away seems remote, particularly given the fact that this is only a pilot program. If the program were expanded, however, the mechanics of

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See also H. Debt. Rep. at 14-15 (letter from Milton J. Socolar, Acting Comptroller General of the United States) (emphasizing needs for control over private attorneys).

[247] 22 Weekly Compilation of Presidential Documents 1464 (Nov. 3, 1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5619. See also note 55 supra.

[248] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(5)(A)).

[249] Id. (adding a new subsection 3718(b)(5)(B)).

[250] Id. (adding a new subsection 3718(b)(5)(C)).

[251] See, e.g., 28 U.S.C. § 510 (1982). See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.16-.18 (1978).

the procurement and monitoring processes might threaten to consume so much of Justice's resources that delegation to the General Services Administration or to some of the agencies with the largest amount of debt outstanding might prove inviting. At that point express statutory authorization for the delegation could be sought.

Actual referral of particular cases is expressly vested in the "head" of executive and legislative agencies "subject to the approval of the Attorney General."[252] Testimony regarding the legislation suggested that the Department of Justice would not try to review each case for referral[253] and Congress apparently did not intend to mandate otherwise.[254] Presumably Justice will formulate criteria indicating which types of cases should be referred and at what point in the collection effort involvement of collection counsel is appropriate.[255] For example, where an indebtedness exceeds a particular amount (such as $30,000) Justice may consider that it should handle the litigation rather than outside counsel. Since Justice must under the statute transmit to Congress annual reports dealing with its collection efforts and those of private counsel,[256] it will maintain continuing general supervision over the collection program.[257] With respect to agency referral decisions, the General Accounting Office commented on the proposed legislation, noting, among other things, its assumption that "referral would be made in accordance with uniform standards provided in the" Federal Claims Collection Standards.[258]

There was considerable discussion during the legislative consideration of the new act regarding whether or not private collection agencies should be authorized by their contracts to refer particular claims to attorneys hired by Justice.[259] The collection agency lobby argued for that power and, when the bill was first before the Senate, one of the sponsor's of the legislation suggested that the legislation did not prohibit such referrals.[260] The statutory language vests the referral power in the "head" of federal agencies, though subdelegation is not expressly forbidden. The real problem presented here is the extent of discretion which the agency can grant by contract to the collection firm regarding whether and when to refer claims to attorneys hired by Justice and to whom a reference for litigation can be made. The General Accounting Office urged that strict controls be placed on such referrals.[261]

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[252] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(2)).

[253] House Hearings at 78 (statement of Deputy Assistant Attorney General Robert Ford).

[254] S. Debt Report at 8.

[255] Id.

[256] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(c)).

[257] See S. Debt Report at 8.

[258] H. Debt Report at 14. See 4 C.F.R. ch. II (1987) (standards for the administrative collection, compromise, and termination of agency collection efforts, and referral to GAO and Justice of claims for litigation).

[259] See S. Hearings at 106-150; H. Hearings at 142-185.

One of the strongest arguments with respect to such direct referral was that, when it comes to collection efforts, the debtor will most likely respond to the request for payment by a collection agency if he or she knows that the lack of a prompt response will be met with prompt institution of suit.[262] Requiring agency referral or agency consent to referral in all cases might undercut the effort of this legislation to give some bite to the prelitigation efforts at collection. It was also argued by the collection agency lobby that such firms could undertake much of the task of attorney supervision and monitoring that would otherwise consume the time of the federal agency to whom the debt is owed.[263] These arguments seemed to be directed to establishing a relatively substantial role for collection agencies in the referral process with discretion perhaps vested there regarding when and to whom reference should be made.

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[260] See, e.g., 132 Cong. Rec. S2986 (Sen. D'Amato) (daily ed. March 19, 1986).

[261] H. Debt Report at 14.

[262] S. Hearings at 122.

[263] Id. at 142.

Despite these arguments, the House Report[264] and, perhaps to some lesser degree, the Senate Report[265] suggest that the

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[264] H. Dept. Report at 5:

> In the situation where the agency chose to use a debt collection service, and the service was unable to collect the debt, the agency may then determine that private legal services are needed. In such a case, the agency itself must select the law firm to handle the debt, although the debt collection service may, pursuant to contract or agency direction, actually transfer the file to the law firm selected by the agency. In the case of such a decision, the debt collection service must return the entire file on the debt to the agency or transfer it at the agency's direction to the selected law firm.

[265] S. Dept. Report at 9:

> In order to facilitate referrals, a federal agency may send its cases directly to private counsel that has been retained by the Department of Justice to handle such a case or class of cases. When claims of indebtedness are pending with a private collection agency under a contractual agreement, the federal agency head may direct those cases to be transferred from the collection agency to the approved private counsel. Such direct transferal of the case documentation and other information will facilitate timely litigation.
>
> This legislation does not prohibit an executive or legislative agency from including in its contract with a private collection agency a provision authorizing a collection agency to transfer prior-approved claims of indebtedness to a private counsel which has been retained by the Department of Justice to take legal action on the particular case or class of cases. (emphasis added)

The underlined portion of the Senate Report could be construed to suggest that an agency may give advance approval of referrals, leaving it up to the collection agency to decide whether and when to refer. Since the House Bill was enacted in lieu of the Senate bill and the House Report (Sept. 27, 1986) was issued and available to the Senate at the time of the Senate's final action (Oct. 8, 1986), it can be argued that any difference between the two Reports should be resolved in favor of the House principle role for the collection agency in attorney referral is limited to transferring the file to the attorney chosen by the agency. The decision to litigate and the choice of litigator must apparently be made by the agency.

Whether or not cases are referred by the federal agency itself or by its collection agent, the power of compromising a claim or terminating an action remains with the federal agency.[266] However the statute does not expressly forbid contractual provisions with attorneys granting them some discretion on these matters, as for example, where the debt may be relatively small in size.[267] Otherwise the statute does not describe the type or degree of supervision over the activities of outside counsel expected of the referring agency or the Justice Department.[268]

c) Miscellaneous provisions. Contracts with attorneys for collection could justifiably contain various other provisions to protect both the interests of the government and the public. Some of those suggested during the legislative consideration of the amendments include agreements holding the government harmless from claims made by debtors (or others) arising out of the efforts of private counsel to collect debts[269] and/or requiring that counsel have insurance to protect the government from such claims.[270] Provisions permitting periodic auditing of the accounts of retained attorneys,[271] for segregated trust funds to hold government moneys,[272] and prompt remittance of collections to the

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view. In fact the Senate "debate," when the House version was before it, seemed to accept the House approach. See 132 Cong. Rec. S15616 (collection agency "to transfer all the documents related to the claim to private counsel retained by the Attorney General to whom claims have been referred by the Federal agency should legal services be required") (statement of Sen. D'Amato).

[266] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(5)(B)).

[267] See H. Debt Report at 15 (letter of Acting Comptroller General).

[268] But see text at notes 246-47 supra.

[269] See S. Hearings at 32.

[270] Id. at 81.

[271] Id.

[272] Id. at 88.

federal agency[273] have been used in other contexts and seem equally applicable on the federal level. While the Debt Collection Amendments expressly make counsel subject to various provisions of the Fair Debt Collection Practices Act,[274] a contractual provision highlighting this fact along with the potential applicability of other federal and state laws relating to debt collection would seem particularly appropriate.[275] Similarly, failure to comply with applicable standards of professional responsibility and conflict of interest regulations and prohibitions[276] could be specifically referred to as a basis for contract termination. Finally, contract termination could be expressly authorized in the case where the contractor fails satisfactorily to pursue one or more claims where the contractor has been assigned responsibility for a whole class of debts.[277]

3. Selection Process. The legislative history clearly demonstrates that competition was to characterize the process of selection of attorneys for debt collection.[278] The requirement that the Attorney General use his "best efforts" to obtain "at least four such contracts for legal services with private individuals or firms" in each judicial district chosen for the pilot program was seen to be related in some way to ensuring competition.[279] More significantly, the statute as finally enacted expressly provides that nothing in it "shall relieve the Attorney General of the competition requirements set forth in title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251 and following)."[280] This provision evidences the assumption that the Competition in Contracting Act of 1984[281] applies to the procurement of the services of private attorneys generally and, in particular, the services of debt collection lawyers hired by Justice under this program. While

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[273] Id. at 81.

[274] 15 U.S.C. §§ 1692 et seq. (1982). See Sec. 1(4), Pub. L. 99-578 (adding a new subsection 13718(b)(6)).

[275] Cf. 31 U.S.C. § 3718(a)(1)(B) (1982).

[276] See text at note 454 infra.

[277] See S. Hearings at 81 (which lists other conditions imposed by New York).

[278] See S. Debt Report at 8; H. Debt Report at 4-5.

[279] Id.

[280] Sec. 1(4), Pub. L. 99-578 (adding a new subsection 3718(b)(1)(A)).

[281] See text at notes 132-85 supra.

some of the exemptions from "full and open competition"[282] might conceivably apply to some instances of retention of debt collection counsel,[283] Congress seems to have assumed that generally the statutorily compelled competition procedures would be followed in the implementation of this program.[284] The legislative history in the House is particularly emphatic on this point.[285] Since the assumption seems to have been that contacts awarded would not apply simply to one claim but many,[286] the expense, including the delay, introduced by competitive procedures was presumably viewed as justifiable given the potential benefits, and this is, after all, only a pilot program. Some of the states which have used private attorneys for debt collection have eschewed competitive bidding, though New York has not and believes it has saved considerably in opting for that type of procurement process.[287]

While the statute focuses to some substantial extent on the type and magnitude of fee charged for collection services, it is clear that Congress did not believe that price alone should determine the selection of an attorney for a contract. Thus, sealed bids are not required.[288] The House Report noted that "[o]f course, these competition requirements do not mandate that the Attorney General always select the low bidder; he may consider such factors as experience in the field and previous performance in collecting debts in selecting firms for contracts."[289] Similarly the Senate Report indicated that "the most important consideration in debt collection contracting should not be the contingency fee percentage, but rather, the net amount of dollars returned to the Government."[290]

Accordingly while the Debt Collection Amendments do not lay down in detail the considerations deemed relevant to the selection of contractors, it was apparently expected the Justice would consider, along with proposed fee arrangements, the "experience, skills, reputation and resources of the competing contractors."[291] Specifically the Senate Committee on Governmental Affairs expects that:

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[282] See, e.g., 41 U.S.C. § 253(c).

[283] See text at notes 148-64 supra.

[284] See S. Debt Report at 8; H. Debt Report at 5.

[285] See, e.g., H. Hearings at 64-69.

[286] See S. Debt Report at 7.

[287] See S. Hearings at 35-41.

[288] See 41 U.S.C. § 253(a)(2).

[289] H. Debt Report at 5.

[290] S. Debt Report at 7.

> the Department will retain firms with debt collection experience, a trained collections staff, and the capability to handle a large volume of cases, which may require automated litigation support. The reputation of the law firm for responsible practices in the collection of consumer and commercial debts must also be considered. Attorneys selected should meet the highest ethical standards and be members in good standing in the state bar. The Committee would expect the Department to contact the American Bar Association, the Commercial Law League, and state and local bar associations, as well as creditors who have used law firms, to determine their reliability, recovery rates, and performance.[292]

In addition to the foregoing considerations, the Debt Collection Amendments direct the Attorney General to "use his best efforts to enter into contracts . . . with law firms owned and controlled by socially and economically disadvantaged individuals."[293] Widespread advertising of the opportunity to compete for these contracts was seen as one way to ensure that such firms have an adequate opportunity to compete.[294] Moreover, if such contracts are entered into, each agency must "use its best efforts to assure that not less than 10 percent of the amounts of all claims referred to private counsel by that agency are referred to law firms owned or controlled by socially and economically disadvantaged individuals."[295]

In his signing statement accompanying the bill, the President noted his understanding that such "objectives will be pursued in a race-neutral manner with respect to the actual award of contracts, and that the criteria for identifying socially and economically disadvantaged contractors will not contain preferences or presumptions based on race or ethnicity."[296] The President also observed that "[i]mplementation of these provisions in any other manner would be of doubtful constitutional validity because the goal is not premised on findings of actual discrimination in the granting of contracts."[297]

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[291] Id.

[292] Id.

[293] Sec. 1(4), Pub. L. 99-578 (adding subsection 3718(b)(1)(B)).

[294] S. Debt Report at 8.

[295] Sec. 1(4) Pub. L. 99-578 (adding subsection 3718(b)(3)).

The administration-supported bill proposed that judicial review of the procurement decisions of the Justice Department under this program be expressly precluded.[298] Such a provision does not appear in the final version and in fact the Senate Report expressly contemplates that such review would be available with Justice Department "criteria and guidelines for selection" to guide the reviewing court.[299]

4. Program Reports. The Attorney General is required by the statute to annually report to Congress on the activities of the Department of Justice to recover indebtedness owed the United States, including not only its own litigation but that conducted by private counsel retained under the pilot program.[300] Moreover at the conclusion of the three year life-span of the program, the Comptroller General is required to conduct an audit of the actions of the Department of Justice under the statute, including the extent of the competition among private counsel to obtain contracts awarded, the reasonableness of the fees provided in those contracts, the efforts to retain the services of law firms owned and controlled by socially and economically disadvantaged individuals, and the results of private debt collection efforts.[301]

5. Justice Department's Implementing Regulations.

Implementing regulations required by the Debt Collection Act were adopted by the Department of Justice on June 18, 1987[302] with an effective date of August 31, 1987. While the Department anticipates that eventually additional rules regarding private debt collection may be adopted,[303] this initial set does very little to elaborate the content of the program.

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[296] 22 Weekly Compilation of Presidential Documents 1464 (Nov. 3, 1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5619.

[297] Id.

[298] See, e.g., S. Hearings at 30-31.

[299] S. Debt Report at 8.

[300] Sec. 1(4), Pub. L. 99-578 (adding subsection 3718(c)).

[301] Sec. 6, Pub. L. 99-578.

[302] See 52 F.R. 24448 (July 1, 1987).

First of all, the Assistant Attorney General for Administration is delegated the authority to "develop and administer" the pilot program, including the establishment of policies and procedures and entering into contracts with private attorneys.[304] Subdelegation of this authority is provided for.[305] However the sole responsibility for designating the pilot districts apparently lies with this Assistant Attorney General.[306]

Secondly, United States Attorneys in the pilot districts must direct "the full cooperation and assistance of their respective offices in implementing the program."[307] An Assistant United States Attorney in each district will be "responsible for assisting the contracting officer by supervising the work of the private counsel in their respective districts and providing necessary approvals with respect to the initiation or settlement of lawsuits or similar matters."[308]

The reference to "supervision" raises the specter of personal service contracting and the issues implicated thereby.[309] This part of the regulation is obviously refective of the constitutional and policy concerns regarding the vesting of litigation authority outside the government which have bedeviled the Department from the outset.[310] At the same time the regulations do not indicate when "approvals" of initiation and settlement of suits are "necessary" or whether the "approvals" referred to are those of the Department of Justice or the agency with a claim against the debtor. In short the manner in which control over the efforts of private counsel is exercised has not been clarified to any substantial degree by the regulations, though apparently at the procurement stage the request for proposals will go into this matter in some detail.

Finally, the regulations note that contracts for legal services for debt collection will be awarded "in accordance with competitive procurement procedures mandated by Federal law . . . ."[311] They also indicate in a general way the manner in which participation in the debt collection program by law firms owned and controlled by socially and economically disadvantaged individuals will be encouraged.[312]

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[303] Id.

[304] Id. at 24449 (28 C.F.R. § 11.1).

[305] Id.

[306] Id. (28 C.F.R. § 11.2).

[307] Id.

[308] Id. (emphasis added).

[309] See text at notes 115-16 supra.

[310] See text at notes 55, 246 supra.

C. Concluding General Observations

In enacting the Debt Collection Amendments of 1986, Congress added to those comparatively rare instances where it has expressly authorized the use of private attorneys for litigation purposes. The limited nature of this program in terms of both its temporal and geographical scope along with the extensive reporting and auditing requirements evidence Congressional awareness of the potential risks, at least in the area of debt collection, which are posed to both governmental and private interests by widespread reliance on outside litigation counsel. The controls on the activities of the attorneys hired which are mandated by the statute or imposed by agency regulation and practice will hopefully mitigate these problems as well as moot any potential constitutional challenge.[313] At the same time, however, the degree of control provided may subject these attorneys to some regulation by OPM[314] and, as we shall see, bring them within the coverage of the federal conflict of interest statutes.[315]

The legislative history of the Amendments indicates Congressional awareness that in the area of legal services contracting, an agency may, and perhaps should in most cases, be guided not merely by the lowest price available but by other less easily quantifiable considerations. At the same time, Congress has made it clear that competitive procurement of services should be the rule and not the exception even with regard to attorneys.

Finally, the program established by the Amendments in effect represents a congressional judgment that it may in some instances be more cost effective to use private counsel than government lawyers.[316] One of the alternatives in 1986 was to appropriate additional funds to expand the staffs of the various United States Attorneys offices sufficiently to handle the debt collection effort entirely in-house, an approach that apparently even the Department of Justice did not seriously advocate. Because of various factors, including the expertise of collection attorneys, the choice was made that "privatization" should be seriously pursued, if only on a trial basis.

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[311] 52 F.R. 24449 (28 C.F.R. § 11.3).

[312] _Id._

[313] _See_ text at notes 8-15 _supra_.

[314] _See_ text at notes 115-16 _supra_.

[315] _See_ text at note 454 _supra_.

[316] _See_, _e.g._, S. Hearings at 19.

V. Agency Use of Outside Counsel: A Survey

This survey of agency use of outside counsel to perform legal services is based on a variety of sources. First of all, several years ago, pursuant to the Freedom of Information Act,[317] *The National Law Journal* filed requests with various agencies for documentation related to this issue. The materials which were furnished in response to these requests were examined for this study, though they were somewhat dated at the time this report was prepared. In order to obtain more complete and current information, the Administrative Conference directed a questionnaire[318] to several agencies including the Departments of

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[317] 5 U.S.C. § 552 (1982).

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Administrative Conference of the United States

Survey of Government Use of Private Attorneys

Agency/Department: ______________________________

Hiring or contracting office: General Counsel or Solicitor _____
Other agency office (specify) _________
(If hiring or contracting was by an office other than the agency's legal office, please indicate below what role, if any, the agency's legal office has in the decision to seek outside counsel or to use the particular attorney.)

Name of attorney or firm ____

Location ______________________________________

Relationship of attorney with agency: Contractor ___ Subcontractor ___
Special Government Employee ___ Other (specify) _________________

Period covered by contract or employment ________________________

Fee paid per hour $ __________ Total number of hours worked _____
Was the fee less than the normal rate in that location? _____
Was the fee less than the normal rate for that attorney or firm? ___
(If yes to either question, please explain below.)

What was the statutory authority for hiring or contracting with the attorney?

____

Why did the agency choose to use an outside attorney?

____

Transportation, Interior, Housing and Urban Development, the Environmental Protection Agency and the Veterans Administration. The responses to this were analyzed. Finally various interviews were conducted with agency officials[319] as well as attorneys[320] who have worked under contract with the government. The results of this survey follow.

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Did the agency follow the provisions of the Competition in Contracting Act? ______

How were competitive bids sought? (If exempt from the Act, please explain.)

How did the agency determine that the attorney had no conflict of interest?

General description of work to be performed:

Remarks: ______

[319] The author interviewed officials of the Federal Deposit Insurance Corporation and the Federal Home Loan Bank Board, among other agencies. The law firm of Wolf, Block, Schorr and Solis-Cohen, the prior consultant on this study of federal agency use of private attorneys, conducted other interviews of officials, the findings of which are referenced, where appropriate, in the footnotes to Appendix A to this report (though the specific interviewee is not named in this Report, only a reference to the relevant page of the Wolf Block Report). In addition, ACUS held a public hearing (hereinafter "ACUS Hearing") on May 26, 1986 at which various officials testified. Where information from that hearing is relied upon, the footnotes to Appendix A so indicate.

[320] The prior consultant, Wolf, Block, Schorr and Solis-Cohen, conducted these interviews, the substance of which is contained in its draft report.

In view of the fact that currently the largest consumers of private attorney services among federal agencies are the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation and that more detailed information was available regarding their practices than those of other agencies, the following descriptions of their use of private attorneys are relatively elaborate. While the situation confronting other agencies may be unique in one or more ways, the experience of the FDIC and the FSLIC may be a source of guidance for them where appropriate.

The time constraints applicable to the preparation of this report precluded an in-depth examination of the practices of these other agencies. Moreover it appears that record-keeping with regard to the use of outside counsel is not always provided for in such a manner that it is relatively easy to identify the exact scope and nature of all legal work which has been contracted out. Available statistics on non-banking agencies is, therefore, somewhat sketchy. Nevertheless the existing data conveys a general sense of the scope of use of outside counsel throughout the federal government. In addition that data provides other significant insights into agency practices with regard to retaining private attorneys. Accordingly, following the discussion of the FDIC and the FSLIC, a general overview of the situation in the rest of the government is provided along with Appendices A, A-1 and A-2 which summarize the information available with regard to specific agencies.

A. Federal Deposit Insurance Corporation

1. Background. The Federal Deposit Insurance Corporation functions in two distinct capacities: first of all, as the insurer of deposits and the primary federal regulator of state-chartered banks which are not members of the Federal Reserve System, and secondly, as receiver or liquidator of insured banks that have failed.[321] From its origin in 1933, the FDIC has retained private attorneys in connection with the liquidation of assets acquired from closed, insured banks.[322] By statute the Corporation has the authority "to make contracts," "to sue and be sued," "to act as receiver," "to prescribe . . . rules and regulations," and "to exercise . . . such incidental powers as

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[321] Memorandum to Honorable Doug Barnard, Jr., Chairman, Commerce, Consumer and Monetary Affairs Subcommittee, Committee on Government Operations, U.S. House of Representatives (March 15, 1985) (hereinafter "Barnard Memorandum") at 1.

[322] Interview with Thomas A. Rose, Deputy General Counsel and Carroll R. Shifflett, Assistant General Counsel, FDIC on March 12, 1987 (hereinafter "FDIC Interview").

shall be necessary to carry out the powers . . . granted."[323] These are the provisions apparently relied upon as a basis for the retention of private attorneys for litigation and other purposes.[324] In fact in one unreported opinion, a challenge to the authority of the FDIC to use private attorneys to collect debts was rejected on the basis of this statute.[325]

In recent years almost all of the legal services for the FDIC by outside counsel have been performed in connection with failed banks and the FDIC's receivership and liquidation activities and in connection with assistance transactions involving failing or potentially failing banks.[326] At the end of January 1987, there were 28,860 of those types of cases; 13,557 of which were being handled in-house by the Corporation's employees. Contract attorneys were in charge of 13,940 cases and another 1363 were considered "joint", that is inside and outside counsel formed a "team" for their management.[327] On a percentage basis, more litigation is currently being handled by FDIC employees than at any time in the agency's history.[328] In terms of expenditures for legal fees related to receivership and assistance transactions, the Corporation paid $7,586,957, $9,368,412, $21,341,407, $26,603,645, $37,232,449, and $45,008,440 in the fiscal years 1981-1986 respectively.[329]

In the FDIC's status as receiver or liquidator, outside counsel engage in a variety of types of legal work: loan restructurings, collection suits, foreclosure actions, bankruptcy matters, claims based on bankers' blanket bonds, and defensive litigation usually involving claims against a failed bank which the FDIC, as receiver or liquidator, is obligated to defend. The Corporation has also engaged outside counsel on legal matters relating to potentially failing banks and in connection with open-bank assistance transactions, such as FDIC-assisted mergers and the Continental Illinois assistance transaction.[330] The most common reason for seeking outside assistance is not the need for special expertise, though that may be a factor in some cases, but rather the lack of manpower in the agency to handle all legal matters in which the FDIC becomes involved.[331]

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[323] 12 U.S.C. § 1819 (1982).

[324] FDIC Interview.

[325] FDIC v. Barrasso, Case No. 82-725-Civ.-T-GC (U.S. Dist. Ct., M. Dist. Fla., Tampa Div., March 22, 1983) (relying on the power of Board of Directors to prescribe rules and regulations).

[326] Barnard Memorandum at 1.

[327] FDIC Interview.

[328] Id.

[329] FDIC Interview.

[330] Barnard Memorandum at 6-7.

In order to increase its capacity to handle matters in-house, the Corporation has dramatically increased its lawyer-employees from approximately 40 in 1982 to 313 nationwide today.[332] The Legal Division was reorganized in 1984 as part of an overall decentralization of the FDIC's operations.[333] In May, 1987, seventy-nine full-time attorneys worked at the Corporation's Washington office, thirty-four of whom dealt with legal problems associated with the FDIC's liquidation and receivership functions. The Regional and Corporate Affairs Branch is responsible for legal services provided in the agency's six regional offices to support both supervisory and liquidation activities.[334] Seventy-eight full-time attorneys now staff the regional offices, sixty of whom handle liquidation matters. Some of the FDIC's newly hired lawyers are employed under special hiring authority providing for one year renewable appointments. There are currently one hundred and fifty-six of these so-called "liquidation-graded" attorneys. These lawyers work at field site offices. This type of hiring authority permits the Corporation to meet its short and intermediate term needs without taking on the burden of additional permanent staff.[335]

Since the predominant use of outside counsel is in the area of the FDIC's capacity as receiver or liquidator, it is important to note how the fees for these services are paid. Expenses from collection efforts (including allocable FDIC personnel costs for its lawyer-employees) are paid from the proceeds of the collections or absorbed by the Permanent Insurance Fund created by assessments on the deposits of insured banks.[336] Appropriated funds are not involved.[337] Moreover, since the proceeds of collections and other actions benefit private parties and not the United States Treasury, the Department of Justice has suggested that it would be inappropriate for the United States itself to pay for the services through representation by the Department.[338]

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[331] FDIC Interview. See also Barnard Memorandum at 7 ("volume of bank failures is probably the most dominant" reason for going outside).

[332] FDIC Interview.

[333] Barnard Memorandum at 4.

[334] Id.

[335] Id.

[336] Id. at 3-4.

[337] FDIC Interview.

2. Written Guidance. The FDIC has rather elaborate written guidance applicable to the hiring of outside counsel. The purely internal directives set forth criteria for the selection of outside counsel,[339] considerations to be considered in negotiation of the fee,[340] questions to be kept in mind in reviewing a fee bill,[341] and general directions regarding how to handle problems arising in the relationship between the FDIC and the outside counsel. Some of these documents, such as the criteria for choosing an attorney, are similar to those found in the corporate area.[342] Others, such as the fee bill checklist, had no counterparts--at least in the degree of detail and insight--among the corporate materials examined as part of this study. While some of these documents may appear to state the obvious (again the criteria for choice document is arguably an example of this), the guidance is a training tool for new employees and may help to "jog the memory in appropriate cases."[343]

Aside from internal policies, the FDIC has incorporated its restrictions and expectations with regard to the activity of outside counsel in connection with bank liquidation matters in an elaborate employment of counsel letter which will soon be replaced to some degree by a "Guide for Legal Representation" to be distributed to all attorneys, both full- and part-time employees and outside counsel.[344] For clarity of presentation most of the matters covered in these documents are discussed separately below. It should be noted here, however, that the "Guide" stresses the FDIC's desire to obtain "quality legal representation in a timely, efficient and cost-effective manner."[345] The outside attorney is also reminded that the Corporation "places great importance on the professional skills and conduct of all attorneys representing" it and that its status as a public instrumentality "mandates that our attorneys, whether inside or outside, demonstrate the highest standards of ethics, professionalism, and competence."[346]

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[338] Barnard Memorandum at 4.

[339] These include the repute of the attorney or firm in the legal profession and in the locality served; the experience of the attorney or firm in the type of legal work required or expected; the ability of the attorney or firm to handle the anticipated volume of work; the geographic location of the attorney or firm; whether the fee rates are reasonable; whether the attorney or firm can make available an adequate number of attorneys to handle related matters of a routine or less important nature and at a lower fee rate; possible conflicts of interest; the degree of cooperation expected; the responsiveness to the FDIC's needs to be kept informed; and whether the FDIC is a major client of the firm.

[340] These include the volume of work directed at the firm and the treatment of various expenses such as Lexis, typing, filing and secretarial overtime.

[341] For example, has FDIC been credited for the "learning curve" when the firm shifts attorneys for its own purposes; was there excessive senior attorney review or excessive paralegal time; did some attorneys regularly bill 6-8 hours a day; are there excessive reviews of file or status reports; are continuances on behalf of FDIC requested because the firm is not ready?

[342] See text following note 30 supra.

[343] FDIC Interview.

3. Procurement Procedures. Apparently the FDIC is not subject to the civil service regime as a matter of law but has brought itself under its strictures as a matter of policy.[347] Among other things, this would appear to mean that the distinction between "personal" and "non-personal" services contracts which has such significance for other governmental entities in their procurement of services has,[348] at the least, diminished significance in the case of this Corporation. Neither the internal directives nor the employment-related documents supplied outside counsel make a point of identifying the attorney as an "independent contractor." All this means that the FDIC can legally exercise substantial supervision over the efforts of outside counsel without undue concern for unwittingly bringing the contractual relationship within the regulatory jurisdiction of the OPM. As will be seen, in fact the FDIC often exerts such close control.[349]

Secondly, as a "mixed ownership" corporation, the FDIC is not subject to the Competition in Contracting Act of 1984.[350] This does not mean, however, that the agency does not attempt to conduct its procurement in a manner which may achieve much the same purposes as that legislation. When time and circumstances permit, three or four firms are identified and contacted in order to determine their interest in representing the agency. Representatives of the firms are interviewed[351] with regard to their fees and other matters including those covered by the "criteria" document.[352] Evaluation of the responses may narrow the field to one or two. Then those lawyers who will actually perform the work are interviewed.[353] This process has even been utilized when the agency has not been dissatisfied with a firm but merely to insure that it is getting the best services for the best price.[354]

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[344] FDIC Interview.

[345] Federal Deposit Insurance Corporation Guide for Legal Representation (hereinafter "FDIC Guide") at 1.

[346] Guide at 2.

[347] FDIC Interview.

[348] See text at notes 44-83 supra.

[349] See text at notes 357-80 infra.

[350] See text at note 141 supra. See also Letter of Michael B. Burgee, Deputy General Counsel to Marshall J. Breger, ACUS Chairman (Nov. 10, 1986).

Given the immediate need for counsel in cases of unexpected bank failures,[355] as well as the desire to avoid advance publicity of potential failures and the inevitable public reaction, full and open competition within the meaning of the CICA may simply not be feasible for the FDIC in many instances.[356]

4. Case Management, Supervision and Control. It is the policy of the FDIC "that attorneys in its Legal Division should always be responsible for managing any legal assignment or litigation, even though a matter has been referred to outside counsel."[357] Therefore an FDIC attorney's approval is required for "all major strategic or tactical decisions,"[358] at least where a case involves important issues or large sums.[359] The degree of FDIC involvement in a case varies in practice from instances where a "joint" approach is taken and substantial control resides in the Corporation to "routine" matters requiring relatively little overall supervision.[360] The degree of involvement may vary depending on the extent of experience with and trust in the attorney or firm retained.[361]

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[351] FDIC Interview.

[352] *See* note 339 *supra*.

[353] FDIC Interview.

[354] *Id.*

[355] *Id.*

[356] *See also* text at notes 417-18 *infra*.

[357] FDIC Guide at 2.

[358] *Id.* at 2.

[359] *Id.* at 2. *See also* FDIC Interview.

[360] Guide at 2. *See also* FDIC Interview.

[361] FDIC Interview.

At the outset of a referral of a case, the FDIC attorney assigned the matter develops with the outside counsel a "case plan"[362] which covers, inter alia, anticipated discovery, the issues requiring research, and a strategy of achieving a negotiated settlement.[363] In addition counsel is asked for an initial assessment of the likely outcome of litigation, time required to conclude the matter and fees and expenses to be incurred.[364] A litigation budget may be drafted.[365] Compliance with the case plan and budget, as initially agreed upon or later modified, is monitored closely as a cost control technique.[366] Particularly at the beginning of the relationship with outside counsel, pleadings and other filings may be reviewed by the FDIC attorney in charge prior to filing.[367] Correspondence and other documentation, whether from retained or opposing counsel, are also forwarded to the FDIC.[368]

Retained attorneys are given a variety of instructions regarding their conduct of the case in the written guidance documents supplied by the FDIC. Specifically outside counsel are advised to avoid multiple representation of the firm at meetings or depositions, rotating lawyers knowledgeable about FDIC matters and using FDIC work to train personnel.[369] To avoid costly duplication of research efforts, the FDIC has a "brief bank" which contains the results of all major research projects.[370] These documents are made available to outside counsel, who is, accordingly, cautioned not to embark on a significant research project until it has been determined whether the materials in the brief bank contain relevant information.[371] There are certain legal issues of special interest to the Corporation because, for example, of the need for a nationwide approach. Counsel are directed to contact FDIC staff before researching or drafting on these issues.[372] Relevant research or statements of agency policy may be provided counsel or the FDIC may take over the part of the case raising issues of particular interest to the Corporation.[373] In areas of the country where FDIC has an office, as a cost control mechanism[374] or for other reasons,[375] the Corporation's legal staff may take over discovery or other projects.

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[362] FDIC Guide at 2.

[363] Employment of Counsel Letter at p. 2. See also FDIC Guide at 8.

[364] Employment of Counsel Letter at 2. See also FDIC Guide at 9.

[365] Employment of Counsel Letter at 2. See also FDIC Guide at 9.

[366] FDIC Guide at 3, 9.

[367] Employment of Counsel letters at 2. See also FDIC Guide at 10.

[368] Employment of Counsel Letter at 3. See also FDIC Guide at 10.

[369] FDIC Guide at 4.

[370] Id.

[371] Id.

In addition, retained counsel are advised regarding various aspects of FDIC's litigation and settlement philosophy and procedures. Specifically, attorneys are told that the Corporation does not want to take extreme positions unlikely to have a substantive impact on litigation and that coercive, delaying or obstructive tactics should be avoided.[376] Where possible, cases should be settled at a very early stage.[377] All settlement offers must be immediately reported to the FDIC attorney in charge.[378] Finally counsel is directed to be alert to opportunities for utilizing non-judicial dispute resolution approaches.[379]

Upon the filing of the complaint or answer, the outside counsel must submit a "commencement of action" report which includes the docket number, claim amount, the statute of limitations date, and the date the complaint was filed, among other things. Along with fee bills, counsel must quarterly file written "status reports" which include the next hearing date, the current estimated cost of litigation, the current success ratio, current estimated time of completion, cumulative fees and expenses, and estimate of judgment size and collectibility. Where a litigation budget exists, counsel is requested to review it in connection with these reports and, if the cost of any significant budget item is expected to increase by more than 10%, counsel must contact the FDIC attorney in charge to discuss the reasons for the increase and the alternative courses of action.[380]

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[372] Id.

[373] Id.

[374] Id. at 5.

[375] FDIC Interview.

[376] FDIC Guide at 5.

[377] Id. at 6.

[378] Id. at 6.

[379] Id. at 6.

[380] Id. at 9-10.

5. Fees. Since the FDIC wants to "maximize recovery and minimize the expense," it does not always require that a fee be based on an hourly rate or a contingency. Rather a variety of fee arrangements are possible. The Corporation wants to retain its ability to choose the option that is best in the circumstances.[381] Often firms give the FDIC a discount from their normal rates.[382] It is the total cost of legal services and the results achieved that is generally viewed as more important than mere rate of compensation.[383]

Apparently the Corporation makes it clear to retained counsel that a case should be handled by the member of a firm who is both capable of an adequate job and yet billed at the lowest rate.[384] Fee bills are to be submitted on a quarterly basis and are to include the date(s) of service, name(s) of the individual service provider(s), descriptions(s) of service(s), time(s) billed for service, hourly rates, expenses billed, and total hours and expenses billed on the case.[385]

6. Conflicts of Interest. Outside counsel are informed that the FDIC expects "the highest ethical standards in [their] representation of the FDIC."[386] At the time of his or her retention, the attorney (or firm) must provide the Corporation with a list of potentially conflicting representations. Thereafter any potential conflict must be discussed with the FDIC as soon as its existence is recognized. The Corporation retains the right to determine whether an actual or potential conflict exists.[387] The conflicts referred to include those covered by the "Code of Professional Responsibility and applicable federal or state provisions."[388] The Guide, therefore, does not clearly answer the question whether (or when) retained attorneys are subject to federal conflict of interest law contained in Title 18

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[381] FDIC Interview.

[382] Id.

[383] Barnard Memorandum at 11.

[384] Id.

[385] FDIC Guide at 12-13.

[386] Id. at 3.

[387] Id.

[388] Id.

of the United States Code.[389] It does not impose those standards regardless of their applicability of their own force.

The FDIC currently has a "conflicts committee" to deal with conflicts issues as they arise and to help avoid their treatment on a purely ad hoc, potentially inconsistent, basis.[390] It may also produce clearer guidelines for future use.

7. Tracking and Evaluation of Outside Counsel Program. The initial and subsequent status reports, along with the quarterly fee bills, provide information that is computer-accessible. As such, it can support an elaborate method of tracking both individual matters and the general flow of litigation for cost control and other purposes.

There is also an "outside counsel working group" made up of in-house attorneys and an outside consultant to evaluate the use of private attorneys by the FDIC and to suggest improvements in the general system or even to offer advice on specific cases.[391] The Guide itself was a product of its efforts.[392] In addition meetings are held involving agency in-house attorneys both from Washington and the regions for training and discussion purposes related to the retention of outside counsel.[393]

The FDIC's experience with hiring outside counsel since 1933, and particularly after the current rash of bank failures began in the early 1980's, appears to dwarf that of many (or most) private corporations. That experience is clearly reflected in the elaborate memorialization of procedures, policies, criteria and approaches. In fact the agency may deem itself more "expert" in this area than most other entities, public or private, and that those have much to learn from it.[394] The Corporation is not free from criticism by its legal contractors, though that criticism may not be repeated in the future in all respects given recent changes evidenced by the production of the Guide and higher staffing levels. In the past the following problems have been identified by outside counsel: weak supervision, frequent turnover of agency personnel requiring re-education regarding pending cases, delay in paying bills, elaborate billing and reporting requirements, and lack of coordination among supervisory groups.[395] The FDIC has admitted that such complaints have been levelled at it and that some problems may exist, though the Corporation does not always see the identified concerns as "problems" but necessary off-shoots of its need to control costs and protect its interests.[396]

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[389] It would appear, however, that the conflict of interest provisions contained in 18 U.S.C. §§ 202 et seq. (1982) do apply to the FDIC. See, e.g., 5 U.S.C. § 105 (1982) ("executive agency" means a government corporation); 18 U.S.C. § 6 ("agency" includes government corporations); 18 U.S.C. § 205 (employees of "executive branch" and "agency"). Only "employees" are covered but, given the control exercised over at least some FDIC outside counsel, it is an open question whether they are not also subject to Title 18. See text at notes 446-54 infra.

[390] FDIC Interview.

[391] Id.

[392] Id.

[393] Id.

[394] Id.

B. Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation

The Federal Home Loan Bank Board is the operating head of the Federal Savings and Loan Insurance Corporation. The former is organized in various offices including the Office of the FSLIC and the Office of the General Counsel, which itself contains divisions which provide in-house legal services to the FSLIC. The services of outside counsel have, on rare occasions, been retained for operations of the Board other than those regarding the statutory duties of the FSLIC. Otherwise almost all of the legal work contracted out has involved the operations of the FSLIC.[397] For statutory authority to hire attorneys, the FSLIC relies in part on the power to "make contracts" and to "sue and be sued."[398]

It may be helpful at the outset to compare and contrast the situation at the FSLIC with that at the FDIC. First of all, while the FSLIC is the second largest consumer of private legal services in the federal government based on available data,[399] it spends far less than the FDIC. For example, in 1986 the FDIC spent approximately $45 million for such services while the FSLIC spent in the neighborhood of $15 million.[400]

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[395] See Wolf Block Report at 101-114.

[396] See ACUS Hearing at 113-14, 117-119 (testimony of Michael B. Burgee, Deputy General Counsel, FDIC).

[397] Interviews with Ronald Oberle, Associate General Counsel for Contracting and Procurement Law, Office of General Counsel, FHLBB on March 12, 1987 and May 15, 1987 (hereinafter "FHLBB Interview").

[398] 12 U.S.C. § 1725(c) (1982). See also 5 U.S.C. § 3109 (1982).

[399] See National Law Journal, Feb. 4, 1985 at 1, col. 3.

[400] FHLBB Interview.

Moreover, the dominant reason given for seeking outside assistance is different. The FDIC explains its use of private attorneys largely as a matter of lack of staff resources to handle the volume of legal work, not the lack of "expertise." On the other hand, the FSLIC's contracting is required by the need for "expertise" with respect to issues of local law.[401] In terms of in-house legal resources the FDIC with over 300 attorneys staffing both Washington, regional and site offices far outdistances the Board with approximately 100 who work in Washington.[402]

Furthermore, written memorialization of the practices relating to retaining and controlling outside counsel and the directions to them is more extensive at the FDIC.[403]

In addition, apparently the degree of control exercised by the FDIC over the conduct of litigation by outside counsel is significantly greater in many or most instances than the control relied upon by the FSLIC.[404] While the FDIC is not by law subject to the civil service regime and, therefore, less likely to concern itself with the legal issues presented by the distinction between "personal" and "non-personal" services contracts,[405] the Board and FSLIC[406] are under the jurisdiction of the OPM and the civil service regime and in fact are very aware of the restrictions applicable in the personal services area.[407] The FSLIC's legal services contracts are clear with regard to the fact that the attorney is operating as an independent contractor with only general direction exercised by FSLIC employees. To the extent that the efforts of the FSLIC in its receivership capacity impact most directly and immediately on private interests and not public interests,[408] perhaps this degree of control is justifiable, though apparently the FDIC does not so view its obligations in dealing with its outside counsel in a somewhat similar context.

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[401] Id.

[402] Id.

[403] During 1987, the FSLIC prepared a more extensive written memorialization of its practices than had existed previously.

[404] FHLBB Interview.

[405] See text at notes 347-49 supra.

[406] Except, perhaps, in its receivership capacity.

[407] FHLBB Interview.

[408] While the efforts of the FSLIC and the FDIC with regard to troubled institutions redound directly to the benefit of private parties, ultimately there are large public interests at stake that justified in the first place Congressional authorization of the programs which these corporations now administer.

With regard to procurement procedures, legally speaking the FSLIC and the FDIC find themselves in somewhat different situations. As a mixed-ownership government corporation, the FDIC is not subject to the Competition in Contracting Act.[409] On the other hand, the FSLIC is a wholly owned government corporation and subject to the Act with respect to at least its insurance and supervisory functions, though perhaps not when it acts as receiver or liquidator.[410] Legal fees for the latter functions at both the FDIC and the FSLIC are initially charged against the estate of the failed bank or thrift institution. However, the insurance fund that may absorb some of these charges is technically different, with the FSLIC's considered appropriated and the FDIC's non-appropriated funds.[411]

Despite these differences, the procurement procedures followed by both entities are not all that far apart in many cases. For one thing while in the case of the FSLIC, it is subject to the CICA with regard to certain of its functions, that statute contains an "urgency" exception[412] which allows the FSLIC to dispense with many of the more formal competitive requirements of the CICA given the need to act quickly on the failure of a thrift institution.[413] In such circumstances the CICA requires that the FSLIC "request offers from as many potential sources as is practicable under the circumstances."[414] Even when acting as receiver or liquidator and arguably not subject to CICA, employees of the FSLIC prior to retaining outside counsel for a particular matter are directed to contact several firms to solicit their interest, discuss possible fee arrangements, potential conflicts of interest, and other matters of concern to the FSLIC. Enough firms must be contacted to identify at least three firms without conflicts of interest, willing to propose to do the work, and technically qualified to perform the services. Such firms are compared "on technical and cost bases" and the proposal "most advantageous to government, price and other factors considered" is recommended for selection.[415] As noted previously, such informal competitive procedures are often found at the FDIC.[416] As in the case of the FDIC, widespread solicitation of proposals, which may be required by Title 41, would create such problems for a potentially failing thrift institution and other interested persons[417] that as a practical matter a more flexible procurement process is dictated in many instances.[418] One FHLBB official interviewed indicated his emphatic view, however, that some form of competition does save substantially in costs of legal services for the government where the decision has been made to contract out.[419]

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[409] See text at note 141 supra.

[410] FHLBB Interview.

[411] Id.

[412] See text at note 150 supra.

[413] FHLBB Interview.

[414] 41 U.S.C. § 253(e) (Supp. III 1985).

[415] FHLBB Guide to Formation and Administration of Legal Services Contracts.

It should be noted that with regard to certain procurements for legal services (e.g. mergers and acquisitions), the FSLIC does provide the full and open competition mandated by the CICA. Such competition may consume at least two and one half to three months from the commencement of the required procedures to the contract award.[420]

Finally, the tracking systems of the FDIC for the purposes of cost control and case management are computerized and largely in place. This was not the case as of September 1, 1987 with the FSLIC, though it was expected to have a Legal Information Management System similar to the FDIC's on line in the near future.[421]

Having surveyed these matters, much of the picture of the FSLIC as a consumer of legal services has been drawn. Nevertheless certain additional information should be noted.

1. Written Documentation of Practices. Other than written solicitations issued relating to particular procurements of legal services in the case of mergers and acquisitions where "full and open competitive" procedures are utilized, the principal documents that currently exist relating to the FSLIC retention of outside counsel include a Guide to the Formation and Administration of Legal Services Contracts, a checklist for negotiating legal services contracts, a "contact" form memorializing discussions with attorneys or firms contacted as part of the informal solicitation of proposals, an internal form memorandum requesting

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[416] *See* text at notes 350-54 *supra*.

[417] *See* text at notes 355-56 *supra*.

[418] *See also* 41 U.S.C. § 253(c)(7) (public interest exception to CICA but requiring notification to Congress not less than 30 days before award of the contract).

[419] FHLBB Interview.

[420] *Id.*

[421] *Id.*

approval of the retention of a particular attorney or firm, and the formal contract with attachments.

The Guide describes in general the method of source selection (including issues to be discussed with firms contacted), internal agency process for contract approval and matters related to contract administration and negotiation.[422] A "checklist"[423] and "contact" form[424] are prepared for each firm contacted and list information that should be conveyed to outsiders regarding FSLIC practices (such as its billing procedures) and information to be collected from firms (such as firm expertise and hourly rates charged). The memorandum "request for contract"[425] is prepared for each contract proposed by agency staff for approval by the FSLIC's contracting officers and includes information such as how many firms were contacted, the name of the firm recommended to provide the services, projected billings, the reasons for the firm's selection and the scope of work to be done.

2. Types of Legal Services. Outside counsel perform the bulk of legal work required when the FSLIC becomes involved with a troubled thrift institution. This may include litigation pending in favor or against the institution, reorganizations, transfers of assets and other work related to the receivership. The FSLIC may provide financial and other assistance directly to the problem institution before failure or may seek to facilitate an acquisition of a troubled thrift by providing such assistance. Contract lawyers may prepare all documents for the proposed transaction and assist in negotiation of the assistance agreement.

3. Criteria for Selecting a Firm. Where the competition requirements of the CICA are followed, the FSLIC must set forth in writing the factors it will consider in evaluating proposals.[426] For example in soliciting proposals for firms to contract with the FSLIC to perform work relating to assistance transactions, the Corporation required a Washington, D.C. office, significant experience with large, complex transactions such as mergers and acquisitions, the ability to work cooperatively with Board personnel, no conflicts of interest, and the willingness to commit to bill at stated hourly rates for a minimum of one year. Such

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[422] Letter from Ronald J. Oberle, Associate General Counsel, FSLIC to author (dated Sept. 14, 1987).

[423] Id.

[424] Id.

[425] Id.

[426] See text at note 165 supra.

concerns are similar to those found in the case of the FDIC's choice of outside counsel.[427]

In addition the FSLIC Guide[428] indicates generally the factors considered by the agency in retaining counsel whose services relate to receiverships and other matters. These include the absence of conflicts of interest, geographic proximity to the troubled thrift institution, technical qualifications to perform the services, and price.[429]

4. Contractual Undertakings by Outside Counsel. As noted previously, one of the principal documents relating to retention of outside counsel is a form contract.[430] It is intended to memorialize various understandings between the FSLIC and the service provider.

The contractor is advised that it is to provide the services in accordance with directions given by the General Counsel's Office and under the general direction of the General Counsel. The contractor is also told to promptly advise the FSLIC regarding any matter that may give rise to a conflict of interest or other ethical bar to representation. The document indicates that the contractor is an "independent contractor." As long as the relationship in a particular case is so viewed, the federal conflict of interest statutes do not apply.[431]

Payment for services is based on hourly rates, the range of which is specified in the agreement. The negotiated rate can be changed only by written amendment to the contract and firms may not propose or charge rates in excess of those it is charging the FSLIC on other matters. Reimbursement for certain expenses, at cost, is provided. The negotiations for the contract will involve discussions regarding such matters as the extent to which the FSLIC will pay for certain expenses including copying of documents at cost. The FSLIC is always able to obtain discounts in fees from private attorneys because of the volume of the work assigned.[432]

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[427] See note 339 supra.

[428] See text preceding note 422 supra.

[429] These criteria are similar to those relied upon by private corporations and the FDIC. See text at note 339 supra.

[430] See text preceding note 422 supra.

[431] See text at note 449 infra. But see text at note 453 infra.

[432] FHLBB Interview.

Invoices are required to be submitted monthly. The content of these is prescribed to include the names of agency personnel who reviewed the work in question, a description and cost of the services, including the name(s) of the individual(s) performing them and the time expended. Also on a monthly basis the contractor must file a report detailing the total billings for the month for both fees and expenses, cumulative total billings for all months, names of subcontractors used, and, with regard to litigated matters, the estimated recoverable damages. An agency attorney is designated as the General Counsel's Official Representative whose duties include placing orders for services and inspecting a contractor's work for compliance with the statement of work and standard of performance prior to payment for services rendered.

A comparison between the existing reporting requirements of the FDIC and the FSLIC shows that the former is much more comprehensive, though this difference in treatment is likely to some degree traceable to the desire by the FDIC to maintain closer control over the outside counsel. However reporting requirements under the Legal Information Management System that is now in the final stages of development are almost identical to those of the FDIC.

C. Other Federal Departments and Agencies

With regard to other federal departments and agencies, the available data relating to their use of outside counsel is several years old in many instances and incomplete with regard to some of the issues canvassed by this report. Nevertheless, there appears to be a sufficient basis on which to draw several general conclusions.

First of all, legal work of all types, from the purely advisory to litigation, is contracted out. Some agencies use litigation counsel frequently; others rarely or not at all. The reasons for procuring the services of private counsel appear to be similar to those relied upon by the FDIC, the FSLIC and private corporations.[433] Written agency guidelines with regard to retention of outside counsel and other matters do exist in some cases, and vary from sketchy to relatively elaborate. Competitive procedures are utilized on occasion; at other times some of the exceptions under CICA to full and open competition are relied upon. The relationship generally established with the service provider appears to be considered purely contractual, not employer-employee. Fees paid and fee arrangements vary significantly, to some degree apparently reflective of the type of work involved. Control over retention appears to usually rest in the agency's General Counsel Office. Finally, while contracting out may be the exception rather than the rule in the case of most agencies, a not insubstantial amount of public funds appears to be spent each year for attorneys' services when the expenditures by all agencies are combined.

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[433] See text following note 29 supra, and text at notes 401-02 supra.

A tabular summary of the available data is presented in Appendix A to this report.

VI. Conflicts of Interest

A person performing services for the government may be subject to a variety of statutory prohibitions on receipt of salary[434] and compensation[435] from private sources, participating in governmental decisions in which he or his associates has a financial interest,[436] acting as attorney or agent in certain proceedings at the same time he is working for the government,[437] and serving as an agent or attorney with respect to certain matters following his departure from government employment.[438] Violations are subject to criminal penalties.

These restrictions apply to "officers" and "employees" of the United States, including so-called "special Government employees." They are not limited to attorneys but apply to all persons falling within the ambit of these terms. Attorneys are subject to other conflict of interest regulation pursuant to state codes of professional responsibility,[439] which codes may be more demanding in various respects than the federal criminal law or perhaps less stringent in others. In the latter case, of course compliance with federal law is not excused.

Special government employees are subject to somewhat less restrictions than "regular" employees with regard to the prohibitions on receipt of salary[440] and "compensation" for their services,[441] representation activities while in government service,[442] and activities following their federal employment.[443] With respect to the prohibitions relating to acts affecting a personal financial interest, no distinction is made between special government employees and other employees.[444]

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[434] See 18 U.S.C. § 209 (1982).

[435] Id. § 203.

[436] Id. § 208.

[437] Id. § 205.

[438] Id. § 207. Section 207(g) imposes certain prohibitions on partners of special government employees.

[439] See generally Rotunda, note 56 supra.

[440] Id. § 209(c).

[441] Id. § 203(c).

A "special Government employee" means:

> an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis . . .[445]

In the context of agency retention of outside counsel, it may be crucial to determine whether the attorney chosen is an "employee" within the meaning of these statutes. If he or she is, performance of "duties" pursuant to contract for more than the designated 130 days a year will mean that he or she is subject to the more comprehensive conflict of interest restrictions. If for 130 days or less, then the less restrictive, though still substantial, conditions attach. If he or she is not an "officer" or "employee," then the restrictions do not apply of their own force, though an agency might choose to incorporate them in any contract awarded.

Attorneys appointed as temporary experts or consultants pursuant to 5 U.S.C. § 3109[446] clearly fall within these conflict of interest provisions.[447] Similarly outside counsel appointed, for example, as litigators for the Federal Election Commission pursuant to 26 U.S.C. § 9010[448] may be covered. If, however, a service provider is deemed to be an "independent" contractor, the statutes do not apply.[449] As a general matter, the greater the supervision and control exercised over the contractor's work, the more likely the contractor may be deemed an "employee" for the purposes of title 18.[450] While some interpretations of these federal conflict-of-interest statutes have referred to the civil service definition of "employee,"[451] which emphasizes the element of "supervision,"[452] this has not always been accepted as the only appropriate approach. One court has recently indicated that a temporary consultant appointed under Section 3109 and a special government employee within the meaning of 18 U.S.C. § 202(a) need not meet the civil service definition of "employee" and the alleged "strict supervision" test incorporated therein.[453] It, therefore, appears that a respectable argument might be made that attorneys retained under the 1986 Debt Collection Amendments may be considered "employees" within the preview of the conflict of interest provisions given the degree of control over their activities which is apparently contemplated by the legislation.[454]

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[442] Id. § 205.

[443] Id. § 207(c).

[444] Id. § 208(a).

[445] Id. § 202(a).

[446] See text at notes 69-77 supra.

[447] See generally Federal Personnel Manual, Chapter 735 Appendix C.

[448] See text at notes 107-11 supra.

An agency seeking to retain outside counsel may believe that the restrictions applicable under the conflict of interest provisions of title 18 will unduly restrict its ability to obtain the type of attorney or firm it believes it needs to adequately perform the services. Where this is the case, surrender of substantial control, where permitted by law, may be the only way to avoid this result, though it may in fact not always be sufficient in and of itself.[455] On the other hand, where an agency believes that any attorney retained should adhere to the statutory restrictions, it has more freedom in structuring its relationship with the contractor and, even where the contractor is deemed "independent", the agency could impose the prohibitions of Title 18 by contract.

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[449] See, e.g., Office of Legal Counsel, Department of Justice, Memorandum Opinion for the Deputy Associate Attorney General (prepared by Larry A. Hammond, March 23, 1979).

[450] Id. note 2.

[451] Id. See also Memorandum from J. Jackson Walter, Director, Office of Personnel Management to Heads of Departments and Agencies of the Executive Branch Re Members of Federal Advisory Committees and the Conflict-of-Interest Statutes (July 9, 1982) at 6. (hereinafter "Walter Memorandum").

[452] 5 U.S.C. § 2105(a)(3) (1982).

[453] See Aluminum Co. of America v. F.T.C., 589 F. Supp. 169, 175-6 (S.D.N.Y. 1984).

[454] See text at notes 246-47 supra. See also Lovitky, supra note 47, at 345-48.

[455] See Walter Memorandum.

Where these restrictions do apply, the agency should examine for potential conflicts at the stage where it is considering which firm or attorney to retain and also require disclosure by the contractor of actual or potential conflicts as soon as they become evident after contract execution.[456] At the outset of the relationship the contractor should be clearly advised that the prohibitions of Title 18 apply[457] (if they do).

VII. General Summary, Conclusions and Recommendations

Clearly, retaining outside counsel to provide legal services to the federal government is the exception rather than the rule for most agencies. Other than those instances where there might be a lack of legal authority, this pattern may be attributable to a variety of factors, including historical practice and a concern for the morale of government attorneys who might view such service contracting as suggesting a less than confident agency evaluation of their legal abilities. More importantly, the relative infrequency of seeking outside legal assistance may implicitly reflect judgments that it is indeed more cost effective to rely on in-house expertise than outside counsel in most cases, that consideration of the government and public interest is more likely to be uppermost in the minds of full-time employees than outsiders, and that control over the rendition of the services by a contractor in order to avoid potential constitutional and other problems is more realistically achievable where a full-fledged employer-employee relationship exists. Opinions of the General Accounting Office suggest that, before an agency seeks outside legal assistance, it should assure itself that its staff is not in a position to provide the advice or other services needed.[458] In some instances the staff of other agencies may be in a position to help out and this option may profitably be explored.

Departures from historical practice, even if clearly justified, may have unsettling effects on citizens' perceptions of their government and argue for some degree of caution, or at least clear explanation for these changes. In taking various procurement actions, failure to consider their impact on employee morale may result in the loss of competent and dedicated professionals to the private sector. However, where it is more cost effective to retain outside counsel than perform the services by full time employees, where sufficient control can be exercised over the legal contractor to protect the government's and public's interests, and where adequate mechanisms are in place to protect against conflicts of interest, legal service contracting can be justified and should at least not be discouraged as long as the contracting agency fully considers those less easily quantifiable impacts caused by its procurement activities. Moreover in calculating the economic costs of obtaining outside assistance, the agency must consider those costs imposed by the procurement process itself (including delay) and the needs for supervision over any attorney(s) retained.

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[456] See, e.g., 48 C.F.R. 37.205(b)(4) (1986) (in consulting contracts, disclosure to be required and warning given regarding conflicts).

[457] Cf. Federal Personnel Manual, Chap. 375, Appendix C at 2. Other than the provisions of Title 18 dealing with conflicts of interest, the Code of Federal Regulations contains numerous provisions dealing with employee responsibilities and conduct. See, e.g., 5 C.F.R. Part 735 (1985). Moreover the FAR itself has provisions dealing with organizational conflicts, see 48 C.F.R. § 9.508 (1986), which are applicable to service contracting. Id. § 37.110(d).

[458] See text at notes 92-93 supra.

In the private sector, corporations have increasingly scrutinized their practices of going outside for legal assistance to determine whether or not they are economically justified. The upshot of this reevaluation has resulted in many cases in expansion of in-house staffs. For most federal agencies, the question may in fact present the "flip side" of the problem facing the private firm: should they increase the number of instances where they seek the legal services of private attorneys.

In determining cost-effectiveness it is clear that the situation confronting each agency must be individually considered; generalizations may be of little help.[459] One thing is clear though--price should not be considered in the abstract. The per hour salary cost for in-house assistance may be $40 and that of outside counsel may be $140, but if the likelihood of a successful result is ten times greater in the case where a private attorney is utilized because of his or her experience with the problem, reliance on the governmental employee for the work may be difficult to justify. In view of this, mandatory imposition by legislation of "fee caps"[460] on the amounts paid private attorneys is simply not a good idea since it may prevent the government from obtaining the quality of legal service that it needs to adequately carry out its functions.

For agencies which only occasionally require legal services of a particular kind, it may make little economic sense to argue that the permanent staff size should be augmented for the sole purpose of dealing with these cases. Choosing the optimal full-time staff size is, however, hardly an exact science. For example, putting aside the difficulties in obtaining Congressional approval of funds for staff augmentation, the advisability of significant additions to in-house legal staff in the case of the

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[459] See generally Fischer, note 1 supra.

[460] See, e.g., S. 1580, 99th Cong. 1st Sess. (private counsel for litigation limited to per hour compensation of $75).

FDIC and the FSLIC is made problematical by uncertainty regarding how long the current rash of bank failures will continue.

In determining the optimal size for an in-house legal staff, an agency may profit from the techniques of analysis being developed in the private sector.[461] However, in making that calculation, consideration must be given to resource needs related to supervision exercised over outside counsel by full-time staff.

In that regard, moreover, as the nature of required legal services changes--from purely advisory, to actively dealing with third parties on behalf of the government as in a labor negotiation, to the conduct of litigation--the need for close control over outside counsel may substantially increase based on both constitutional and other considerations. Unlike the situation facing a private corporation, this increased need for and exercise of control can result in the imposition of a variety of legal restrictions relating to the retention of outside counsel.[462] This in turn may prevent successfully contracting out where, in purely economic terms, it is fully justified. Or it may make it more expensive to contract for needed services. For example, due to mandated pay limits or conflict of interest restrictions, private lawyers may be unwilling to furnish requested services or may be willing to do so only at a cost which is prohibitive for the government. This is not to suggest, however, that "control" need be seen as purchased at too high a price in these instances.

Where control of varying degrees is authorized, the techniques currently found in the private sector[463] and in the practices of the FDIC and FSLIC[464] may be worthy of emulation, with appropriate modifications, by other federal instrumentalities. It should be noted that these procedures attempt to insure that costs are minimized throughout the performance of the contract.

It is questionable whether a particular federal agency should now be authorized or required to draft mandatory criteria and practices applicable to contracting for legal services by other agencies. First of all, experimentation in the area of improving cost-effectiveness in the provision of legal services is of relatively recent origin in the private sector. It may, therefore, be premature to draft any set of trans-agency guidelines, even if helpful generalized guidance eventually can be formulated. Secondly, the situations facing various agencies may be unique in ways that argue against trans-agency practices in this area. When it comes to litigation by outside counsel, the experience of the banking agencies is more impressive than many other agencies, including the Department of Justice. Yet much of their expertise may be conditioned by the peculiarities of the problems facing them.

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[461] _See generally_ Fischer, note 1 _supra_.

[462] _See_, _e.g._, text at notes 106-17 _supra_.

[463] _See_ text at notes 32-36 _supra_.

[464] _See_ text at notes 357-80, 430-32 _supra_.

Accordingly, each agency, including the Department of Justice, should experiment with its practices in retaining outside counsel, keeping in mind both cost-effectiveness and the needs for control of decision-making. No one agency should be vested with the power of overview and regulation of these practices at the present time. An exception to this could be made in those instances where the Department of Justice is granted by statute the authority to permit (and restrict) an agency's use of outside counsel for litigation[465] or where the only basis for the agency's litigation authority is a memorandum of understanding with Justice. Here an argument exists that Justice should at least have the power to review and veto an agency's choice of criteria and procedures for contracting for litigation services.

At the same time all agencies should be encouraged to communicate among themselves and with the private sector with regard to techniques for insuring that the use of outside counsel is cost-effective. It may be also advisable in many cases to require that the agency's Office of General Counsel approve all legal services contracts to ensure overall supervision and control of the extent of legal service contracting.[466] In addition, a recommendation has merit that written documentation should be prepared by each agency which may need to retain private attorneys regarding such matters as the criteria for deciding when to retain outside counsel and which attorneys to retain and guidance to firms or attorneys chosen regarding agency practices and expectations. Written documents are useful for training purposes and to jog memory as well as avoid misunderstandings with outside counsel. In drafting these, appropriate attention should be given to similar documents prepared by other agencies and private corporations.

In terms of the procedures for choosing which attorney or firm should provide a particular service, Congress has been reasonably explicit on this matter with the enactment in 1984 of the Competition in Contracting Act.[467] That statute provides exemptions from its formal competitive requirements in particular cases, such as where there is a need for immediate action, so that agencies may not be unduly hampered in many instances, though one study has suggested that the procedures mandated by the Act and the Federal Acquisition Regulation may significantly slow procurement.[468] Even where the costs, in terms of delay or otherwise, of allowing full and open competition are significant and the economic savings from competition are small, the noneconomic benefits of competition in dispelling to some degree the fact or appearance of favoritism may still be substantial.

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[465] See, e.g., 38 U.S.C. § 1830(a) (1982), note 68 supra.

[466] See ACUS Hearing at 27-28 (statement of Joseph Welsh, former Inspector General, U.S. Department of Transportation).

[467] See text at notes 132-85 supra.

It is clear, moreover, that savings to the government resulting from competition, whether formally or informally conducted, can be significant and that cost-saving competitive procedures can be structured to apply to legal services even though the lowest price may not be the sole consideration.[469] Accordingly, even where the CICA is not by its terms applicable, agencies should be encouraged to develop and experiment with competitive procedures to the extent appropriate where legal services contracting is involved.

Finally, while legal services contracting should not be discouraged, the role of the attorney in government[470] is such that the amount of such procurement should be publicly documented. Accordingly, where feasible each agency should prepare an annual public report or otherwise maintain a publicly available list indicating for each legal services contact the name of the attorney retained, the type of work involved, the reason for seeking outside assistance, what, if any, competitive procedures were used, and the fee paid.

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[468] See Ruttinger, supra note 158, at 20, 24, 35 (whether or not an exemption applies). See also ACUS Recommendation 86-8, Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-8 (1987) (changes in FAR may be required).

[469] See text at note 125 supra and text at notes 350-54 supra.

[470] See text preceding note 7 supra.

Appendix A

Agency Use of Outside Counsel

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Agency for International Development	1. issues related to loan by AID to a Costa Rican private sector development institution 2. opinion letter on taking security interest in foreign borrowers' U.S. bank account	1983-84	N/D[1]	Partners: $175/hour Associates: $95/hour (on the average)	N/D	Did not have the staff available to handle these projects; expertise.	N/D	contract
Department of Agriculture	1. collection of delinquent debts (This department employs a collection agency which employs an attorney.) 2. others of undetermined nature (under $10,000)	N/D	N/D	Collector: $11.78/hour Clerk: $5.74/hour	A bidding system used.	N/D	N/D	contract
Department of the Air Force	patent and state of art searches	In 1983, this Department signed 5 contracts with outside legal counsel. In 1984, this Department signed 4 contracts with outside legal counsel.	1983 -- approximately $10,000 1984 -- approximately $6,000	Varies from firm to firm; patent search may cost $200; state of art search may cost $225.	N/D	N/D	N/D	contract

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Department of the Army[2]	1. sale of assets of major defense contractor 2. patent searches and applications	N/D	N/D	N/D	N/D	expertise, save cost	N/D	N/D
Civil Aeronautics Board	NONE	1983-84						
Consumer Product Safety Commission	NONE	1983-84						
Department of the Defense[3]	1. land use and natural resource litigation 2. state and local taxation 3. overseas cases 4. special studies 5. conflict of interest cases	N/D	N/D	N/D	N/D	expertise conflicts of interest	N/D	N/D
Dept. of Education[4]	1. advice on collective bargaining agreement 2. attorneys as members of the Education Appeal Board 3. matters requiring adjudication	1983-84--one contract for advice on collective bargaining agreement	$42,308 was spent for the collective bargaining agreement advice	N/D	N/D	N/D	General Counsel	contract

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Department of Energy[5]	1. restructuring government corporations responsible for coal gasification 2. nuclear weapons programs	N/D	N/D	N/D	N/D	expertise	N/D	N/D
Environmental Protection Agency (EPA)[6]	1. analysis of options for approaches to waste treatment 2. analysis of permit approaches under National Pollutant Discharge Elimination System 3. patent applications, amendments, and appeals	During 1983 and 1984, this agency signed 11 contracts for outside counsel.	Task orders used for subcontract work. Fixed price on patent contracts.	$125 to $1990 per project	Choice by prime contractors; small purchase procedures under CICA[7] in patent area.	specialized needs	General Counsel	contract or subcontract
Equal Employment Opportunity Commission	NONE	1983-84						
Federal Communications Commission[8]	NONE		1983-1984					
Federal Election Commission	NONE	1983-84						

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Federal Emergency Management Agency (FEMA)	This agency hired outside counsel for: 1. litigation related to flood insurance issued by the National Flood Insurance Program. 2. analysis of legal authority for reducing consequences of major terrorism incidents.	1. N/D 2. 1982	1. N/D 2. $21,500.00	1. N/D 2. fixed price	1. N/D 2. negotiation	1. N/D 2. N/D	1. N/D 2. N/D	1. contract 2. contract
Federal Home Loan Mortgage Corp.	general litigation	This office signed 2 contracts for outside legal services during 1980 & 1981.	1980: $94,690.90 1981: $9,225.90	1980: Partner: $129.60/hour Associate: $81-$51.40/hour Paralegal. $29.70/hour 1981: Partner: $141.30/hour Associate: $91.50-$54/hour Paralegal: $34.20/hour	N/D	N/D	N/D	N/D
Federal Labor Relations Authority	NONE	1983-84						
Federal Maritime Commission	NONE	1983-84						

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Federal Mediation & Conciliation Service	investigation of Merit Systems Protection Board	3/84 to 7/84	The total amount spent on this project was $23,156.78.	partners: $150/hour associates: $75/hour	competitive bidding	expertise in Federal civil service law.	N/D	contract
Federal Reserve Banks[9]	1. check, personnel, trademark and other litigation 2. personnel matters 3. labor 4. real estate tax 5. courier rate cases 6. procurement 7. contract (among other things)	varies from bank to bank	The total amount spent by the 12 banks in 1983, excluding matters still in litigation, was $369,603.55. The total in 1984, as of October 26, 1984 was $308,560.64.	N/D	This varies from bank to bank	size and complexity of the legal matter specialized nature of the legal issues	N/D	contract
Federal Reserve System	pension work	During fiscal years 1983 & 1984.	N/D	N/D	N/D	N/D	N/D	contract
Federal Trade Commission[10]	consulting	N/D	N/D	N/D	N/D	N/D	employee generally	N/D
General Services Administration	NONE	1983-84						

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Dept. of Health & Human Services[11]	1. conduct patentability searches 2. prosecute foreign & domestic patent and trademark applications for inventions by scientists working for the government 3. independent advice to agency 4. advice regarding litigation, including patent litigation	N/D	$166,000 was allocated for patent applications in 1983 and $191,000 in 1984. Patent prosecutions paid for by the job, not the hour.	N/D	CICA	expertise, conflicts of interest, lack of staff resources	General Counsel	contracts
Subdivision: National Institute on Drug Abuse	drug abuse project	1978-84	grant award	Total cost was $382,050	N/D	N/D	N/D	contract
Dept. of Housing & Urban Development[12]	1. foreclosure actions on defaulted mortgages 2. admiralty law 3. tax law 4. closing agents 5. bond counsel 6. real estate financing 7. litigation related to HUD owned property including evictions and rent collections 8. title reports 9. training on conciliation techniques	subcontract for foreclosure agent: Dec. 6, 1984-Dec. 6, 1987	In some instances, hourly rates; other times flat fee.	routine foreclosure: $150-$1400 deed in lieu: $75-$250 possessory action: $100-$400	subcontract for foreclosure agent awarded competitively; some of other contracts awarded competitively including sealed bids	Too much work to be handled by in-house counsel; need for unique expertise in a sophisticated field; proximity to property.	Office of Procurement and Contracts, General Counsel, Regional Counsel, or Property Disposition Branch.	contract

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Dept. of the Interior[13]	patent searches, patent applications, patent prosecutions	N/D	Fiscal year 1984 approximately $20,000 Fiscal year 1985 approximately $18,000 Fiscal year 1986 approximately $14,000	attorney: $60-$100/hour patent agent: $50/hour	CICA (firms submit quotations) Firms selected on basis of: 1. geographical proximity to Patent Office (<30 miles) 2. diversity of experience in technologies 3. past experience with Department	more economical to go outside	Individual Bureaus on recommendation of Branch of Procurement and Patents, Division of General Law, Office of the Solicitor	contract
International Trade Comm.	NONE	1983-84						
Interstate Commerce Comm.	NONE	1983-84						
Department of Justice[14]	1. *Bivens* case work 2. foreign litigation	N/D	During 1983 & 1984, this Dept. spent $273,168 on outside counsel. Between 1974 and 1982, expenditures on *Bivens* cases was about $4 million.[15]	For *Bivens* cases, the top rate is $75/hour	N/D	expertise, conflict of interest	N/D	N/D

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
1. Tax Division	NONE	1983-84						
2. Antitrust Division	NONE	1983-84						
3. Office of Legal Policy	NONE	1983-84						
4. Executive Office of U.S. Attorneys	NONE	1983-84						
Department of Labor[16]	collection of fines and penalties under various statutes	N/D	N/D	N/D	N/D	N/D	N/D	N/D
National Aeronautics & Space Administration	patent matters	NASA contracted with seven firms during 1983 and 1984.	N/D	$20-70 per hour	N/D	N/D	N/D	contract
National Credit Union Administration[17]	litigation involving bankruptcies of credit unions	N/D	paid from non-public funds	N/D	N/D	N/D	N/D	N/D
National Science Foundation	NONE	1983-84						

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Department of the Navy[18]	1. representation of Navy personnel abroad 2. advisory opinions on unique issues	N/D	N/D	N/D	N/D	N/D	N/D	N/D
Nuclear Regulatory Commission.[19]	consulting	N/D	N/D	N/D	N/D	N/D	N/D	N/D
Office of Personnel Management	NONE	1983-84						
Pension Benefit Guaranty Corp. (PBGC)[20]	1. assistance in negotiation of term loan agreements. 2. litigation arising from failure of pension plans or companies. 3. advice in securities area	N/D	N/D	N/D	public solicitation	expertise	N/D	contract
Securities and Exchange Comm.[21]	attorneys retained in connection with investigations requiring appearances in foreign countries	1983-87	N/D	N/D	N/D	N/D	Division of Enforcement	N/D

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Selective Service System	EEOC complaint arbitration	This agency signed one contract with outside counsel during FY '83 & '84.	Total estimated cost was $18,000.00	$80/hour	N/D	N/D	N/D	contract
Small Business Admin.[22]	disaster situations; complex and unique problems	N/D	N/D	N/D	N/D	N/D	temporary employees in disaster situations	N/D
Dept. of State[23]	1. amending contracts 2. presenting claims at Iran-U.S. Claims Tribunal 3. renewing contracts for adjudicators 4. foreign pre-litigation and non-litigation (e.g. real estate transfers) 5. advisory assistance 6. international adjudication before International Court of Justice	This office signed 14 contracts during FY '83 & '84 relating to 1, 2 & 3	Total spent '83 & '84 $139,469.44 relating to 1, 2 & 3	N/D	CICA	N/D	N/D	contract

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Tennessee Valley Authority	1. conduct litigation (including uranium cartel cases) 2. settle claims 3. research legislative matters 4. consult as to procurements and generally advise the Board 5. bankruptcy 6. patent work 7. foreign trade agreements	N/D	Total spent during '83-'84 (excluding uranium litigation) was $292,495.21.	N/D	N/D	Uses outside counsel when local court rules require or when otherwise appropriate.	N/D	N/D
Department of Transportation (in general)[24]		During 1983, 17 contracts and 16 contract modifications.	In 1983, $2.4 million					contract
Subdivisions:								
Office of Secretary[25]	1. advice regarding sale of Conrail 2. air traffic, controllers strike 3. transfer of airports to local government 4. teaching workshop for regulatory drafting	1. March to Sept. 1985 2. 1981-85 3. Jan. 1985 to Sept. 1986 4. N/D	N/D	1. $32.92/hour 2. Associate: $75/hour Partner: $150/hour 3. $175/hour 4. $62.50/hour	1. sole source procurement 2. predated CICA 3. sole source procurement 4. sole source procurement/ urgent need	unique expertise and/or emergency	Office of Secretary in cooperation with General Counsel	contract

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
2. U.S. Coast Guard[26]	real property title searches/ title insurance	Contracts let in 1984, 1985, 1986	flat fee	title search: $300-660 title insur.: $100	In one case sole source available for service. In others request for quotations.	need for local counsel	District Legal Office concurred	contract
3. Federal Railroad Adminis-tration (FRA)	1. transfer Alaska Railroad to state of Alaska 2. legal services related to sale of Conrail[27]	1. during FY '83 & '84. 2. Oct. 1986 to date	1. ceiling of $200,000 2. hourly rate	1. $110.00/hour 2. $37.50 to $240 per hour	1. DOT regs. 2. urgency exception to CICA-informal solicitation	1. N/D 2. lack of expertise	1. General Counsel 2. General Counsel	1. contract 2. contract
4. Federal Aviation Adminis-tration (FAA)[28]	1. regulatory analysis 2. general litigation 3. recommendations concerning safety regulations 4. examine legal ramifications of private firms providing FAA flight services. 5. trial preparation for DOTCAB appeal(s) 6. lecture to non-legal staff regarding FAA enforcement 7. See Appendix A-1[29]	1. 1984-86 (intermittently) 2. 1982-1984 3. 1987 4. 1985 5. 1982-85 6. 1986-87	1. N/D 2. hourly rate 3. hourly rate 4. hourly rate 5. hourly rate 6. hourly rate	1. N/D 2. $40-$150/hour 3. $32.50/hour 4. $50/hour 5. $30-$100/hr. 6. $106.00/hr.	1. subcontract, exempt from CICA 2. sole source 3. sole source 4. competition 5. N/D 6. CICA	1. expertise 2. need for additional counsel given urgency and/or expertise 3. expertise 4. need for independent opinion 5. expertise, lack of resources 6. lack of resources	1-4 General Counsel or other offices 5. Aero-nautical Center Counsel 6. FAA Academy	contract or subcontract

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
Department of Treasury			$384,043 was spent by the Treasury on outside counsel during 1983 & 1984.			1. cost 2. expertise 3. potential conflicts of interest	General Counsel	
Treasury agencies: 1. Chrysler Corp. Loan Guarantee Bd.	Sale by the U.S. of warrants to purchase 14,400,000 shares of Chrysler common stock	This agency signed one contract during FY '83-84	The cost of this project was $69,043.95.	N/D	N/D	N/D	General Counsel	contract
2. U.S. Mint	NONE	1983-84						
3. U.S. Customs[30] Service	Collective bargaining	1982-83	N/D	N/D	N/D	N/D	N/D	N/D
4. Secret Service	NONE	1983-84						
5. Savings Bond Division of Bureau of Public Debt	NONE	1983-84						
6. Bureau of Engraving and Printing	NONE	1983-84						

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
7. Federal Law Enforcement Training Center	NONE	1983-84						
8. Bureau of Alcohol, Tobacco & Fire-arms	NONE	1983-84						
9. Gov't Financial Op.	NONE	1983-84						
10. Comptroller of the Currency	1. landlord-tenant case 2. employees named as defendants 3. real estate and pension issues	During 1983-1984, this agency signed five contracts for the retention of special counsel.	minimum retainer or ceiling fee including hourly rates	partners: $75-205/hour senior assoc.: $55-120/hour junior assoc.: $30-90/hour law clerk: $20-85/hour	N/D	N/D	General Counsel	contract
U.S. Information Agency	negotiating a a lease	This agency signed one contract with outside counsel during 1983 and 1984.	N/D					

Agency	Type of legal work done by outside counsel	Dates of Service OR Frequency of Procurement	Fees Paid OR Fee Arrangement	Fee Range	Procurement Procedure	Reason for seeking outside Counsel	Hiring or Contracting Office	Contract or employee
U.S. Postal Service[31]	1. negotiations relating to collective bargaining agreements 2. FLSA case 3. Title VII class action 4. Counsel to the Board of Governors[32]	Since 1980, an outside Counsel to the Board has been retained	Counsel to Board paid based on hourly rates	partners: $160/hour associates: $140/hour (Counsel to (Board)	N/D	N/D	N/D	contract
U.S. Railway Association	1. coordinate defense of litigation arising from conveyance of properties to Conrail 2. banking issues for investment of federal funds in Conrail	N/D	The total expenditure for outside counsel during 1983 and 1984 was $271,650.00	Partners: $145/hour Associates: $80/hour Paralegals: $30/hour	N/D	N/D	N/D	N/D
Veterans Administration[33]	Administration of the loan guaranty program (close direct loans, close sales of VA acquired properties, conduct court actions). Litigation involves evictions, collection on judgment debts, title matters. See also Appendix A-2.[34]	In 1980, fee attorneys handled approximately 4,300 home loan matters and were paid approximately $537,000. During last six months of 1981 fiscal year, fee attorneys handled 1,870 matters and were paid $242,000.	The fees are determined by agreement between the field station director, local loan guaranty officer and district counsel	paid locally prevailing fee for service, not per hour; fee varies from state to state	Each one of the 55 District Counsels is authorized to employ a private attorney to meet local needs. CICA allegedly inapplicable.	Performance of work by a V.A. attorney would be untimely or uneconomical.	General Counsel	no contracts (fee for service attorney)

FOOTNOTES TO APPENDIX A

1. "N/D" indicates that there is no available information with regard to the matter to which it applies. Unless otherwise indicated in these footnotes, the data used to compile Appendix A was furnished in response to requests filed under the Freedom of Information Act, 5 U.S.C. § 552 (1982), by the _National_ _Law_ _Journal_ several years ago. _See_ Nat. L.J. Feb. 4, 1985, p. 51. The National Law Journal compiled the following list of agencies along with their legal services expenditures in 1983-84:

How Much Government Agencies Spent

Federal Agency	Amount Spent 1983-'84
Federal Deposit Insurance Corp.	$34,197,137*
Federal Home Loan Bank Board/ Federal Savings and Loan Insurance Corp.	$8,418,453**
Department of Transportation	$1,293,408
Veterans Administration	$950,000
Legal Services Corp.	$792,192***
Federal Reserve Banks	$578,164
Department of Treasury (Including Comptroller)	$384,043
Tennessee Valley Authority	$374,584
U.S. Postal Service	$300,000
Department of Justice, Civil Division	$273,168
Federal Emergency Management Agency	$229,247
Department of Housing and Urban Development	$176,000
Department of Agriculture	$100,000
Department of Interior	$44,123
Department of Education	$42,308
Department of International Development	$38,000
U.S. Air Force	$24,939
Federal Mediation and Conciliation	$23,137
Selective Service System	$18,000
Environmental Protection Agency	$7,492

*Through first nine months of 1984.
**1983 only.
***Preliminary estimate.

> Agencies surveyed that reported no use of outside counsel included: Internal Revenue Service, Federal Trade Commission, Civil Aeronautics Board, U.S. Army, U.S. Navy, Department of Labor, Securities and Exchange Commission, Office of Personnel Management, Consumer Product Safety Commission, Interstate Commerce Commission, Nuclear Regulatory Commission, National Science Foundation, Federal Communications Commission, Federal Election Commission, General Services Administration, Tax and Antitrust Divisions of the Department of Justice, Equal Employment Opportunity Commission, Federal Labor Relations Authority, the Bureau of Alcohol, Tobacco and Firearms, and the Bureau of Government Financial Operations.

A close examination of Appendix A indicates some relatively minor differences between NLJ figures and those derived from this consultant's review of the FOIA and other material. The reasons for those discrepancies are unclear at this time.

Finally, it should be noted in connection with Appendix A, that data contained under one heading may not always relate to that under another for the same agency, thus introducing certain possible misperceptions. Unfortunately, the lack of complete data at this time prevented a perfect matching.

2. Wolf, Block, Schorr and Solis-Cohen, Draft Report to the Administrative Conference of the United States (hereinafter "Wolf, Block Report") at 68.

3. _Id._ at 69.

4. _Id._ at 70.

5. _Id._ at 70-71.

6. Administrative Conference [ACUS] Questionnaire Response from Francis S. Blake, General Counsel, EPA to Marshall Breger, Chairman, ACUS, dated March 6, 1987.

7. "CICA" refers to the Competition in Contracting Act of 1984, now codified in Title 41, United States Code, Sections 251 _et seq._

8. Wolf, Block Report at 80.

9. There are internal guidance documents applicable to retaining of outside counsel by Federal Reserve Banks.

10. Wolf, Block Report at 83-84.

11. Id. at 71-2; ACUS Questionnaire Response from Darrel J. Grinstead, Associate General Counsel, HHS, to Marshall Breger (March 30, 1987).

12. ACUS Questionnaire Responses from Stuart C. Sloame, Deputy General Counsel, HUD to Marshall Breger, Chairman, ACUS (dated February 20, 1987 and May 19, 1987) and Wolf, Block Report at 72-73. The Department has internal guidance documents regarding fee schedules.

13. ACUS Questionnaire Response from Howard H. Shafferman, Associate Solicitor, Division of General Law, Department of the Interior, to Marshall J. Breger, Chairman, ACUS (no date).

14. Wolf, Block Report at 73-75. The Department of Justice has both regulations and written internal guidance documents dealing with the hiring of private counsel. See 28 C.F.R. § 50.15, 50.16 and Administrative Directive 2120 (Sept. 20, 1982) (Civil Division).

15. See General Accounting Office, JUSTICE EXPENDITURES FOR PRIVATE COUNSEL AND JUDICIAL FEE AWARDS IN ANTITRUST AND SECURITIES CASES (GAO/GGD-84-2, Oct. 7, 1983).

16. Wolf, Block Report at 75.

17. Id. at 84.

18. Id. at 76.

19. Id. at 84-85.

20. Public Hearing Record, Federal Agency Hiring of Private Attorneys, convened by Administrative Conference of the United States, May 29, 1986, Washington, D.C. (Testimony of Frank McCulloch, Special Counsel, PBGC).

21. Letter of Daniel L. Goelzer, General Counsel to Marshall Breger, ACUS Chairman (dated May 13, 1987).

22. Wolf, Block Report at 86-87.

23. Id. at 76-77.

24. In several cases DOT has also hired outside counsel to pursue administrative level procurement. See id. at 78-79. The Department has written internal guidance relating to the hiring of experts and consultants. See DOT Order 4200.15 (March 5, 1981).

25. ACUS Questionnaire Response from Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, DOT, to David Pritzker, ACUS (no date).

26. Id.

27. ACUS Questionnaire Response from Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, DOT, to David Pritzker, ACUS (April 6, 1987). See also General Accounting Office, CONRAIL SALE: DOT'S SELECTION OF INVESTMENT BANKS TO UNDERWRITE THE SALE OF CONRAIL (GAO/RCED 87-88). (In this instance a law firm was involved in the selection of investment banks to serve as co-lead managers for the sale of Conrail.)

28. ACUS Questionnaire Responses from Neil R. Eisner, Assistant General Counsel for Regulation and Enforcement, DOT, to David Pritzker, ACUS (one not dated; the other dated April 2, 1987).

29. Appendix A-1 was compiled from information furnished in response to National Law Journal FOIA request.

30. Wolf, Block Report at 79.

31. Id. at 87-88.

32. See General Accounting Office, POSTAL SERVICE: BOARD OF GOVERNOR'S CONTRACT FOR LEGAL SERVICES (GAO/GGD-87-12).

33. ACUS Questionnaire Response under cover letter from Frederic L. Conway, Special Assistant to the General Counsel, VA to David Pritzker, ACUS (dated Feb. 12, 1987). The VA has both regulations and written internal guidance dealing with hiring outside attorneys. See, e.g., 38 C.F.R. § 14.515(b).

34. Appendix A-2 was compiled from information furnished in response to National Law Journal FOIA request.

Appendix A-1

Federal Aviation Administration

A. Alaska

Regional Office (RO) hired attorney for research on the impact of aboriginal land claims under Alaska Native Claims Settlement Act (ANCSA). It was estimated that this project would cost $5,600.00

B. California

RO signed contracts amounting to, respectively, $19,998.40, $21,000, $17,000 and $20,000 to provide trial counsel for fired air traffic controllers.

C. District of Columbia

RO signed three contracts for outside legal counsel during fiscal years 1983 and 1984. The first contract was for trial work for the government's case against COMSAT before DOT's contracts appeal board. The pay schedule for the contract was:

partners	$150/hour
associate > 4 years	$125/hour
associate < 4 years	$115/hour
paralegal	$ 35/hour

The estimated cost of the project was $125,000.

The second contract was for litigation against General Dynamics. The estimated cost of the litigation was $195,000 and the pay schedule was:

senior partner	$140/hour
senior associate	$ 95/hour
junior associate	$ 75/hour
paralegal	$ 30/hour

The third contract was for work dealing with a labor agreement between the FAA and the Air Traffic Controllers. This was modified frequently and the pay schedule was:

partner	$150/hour
associate	$ 75/hour

D. Massachusetts

RO signed contract to try ex-air traffic controller removal cases. The estimated costs of the legal work was $9,000.000.

E. Oklahoma

RO signed two contracts during fiscal years 1983 and 1984 for defending a case filed by Mike Mahonroney Aeronautical Center. One contract was for an estimated cost of $133,160.00 and the other contract was for an estimated cost of $20,000.00

Appendix A-2

Veterans Administration

1. Alabama: uses outside counsel for evictions and foreclosures; in 1983 $13,454.00, in 1984 $23,358.24.

2. Arizona: for evictions and foreclosures in outlying counties surrounding Phoenix; staff attorneys do evictions locally; in 1983 and 1984, paid a total of $20,750.00 for foreclosures; during the same period, $430.00 on evictions.

3. California: for eviction proceedings, during 1983 and 1984, contracted out 18 evictions at a fee of $75.00 each, for a total expenditure of $1,350.00.

4. Colorado: spent $2,094.08 for outside counsel to represent the agency in eviction hearings in 1983 and the first half of 1984 and spent $2,050.13 for the same from 1/84 through 7/84.

5. Connecticut: employed one law firm during fiscal years '83 and '84; firm was retained to do a title search for a fee of $100.00.

6. Washington, D.C.: contracted with four firms during fiscal years '83 and '84 for eviction and foreclosure proceedings in Maryland, Virginia and the District of Columbia; the following is a break-down of the fees paid to outside counsel--

	evictions	foreclosures	Total
1983	7,957.58	2,210.00	10,167.58
1984	3,420.60	3,960.00	7,380.60

7. Georgia: retained outside counsel for many actions related to its loan guaranty program and spent $24,738.82 between 1/4/83 and 9/20/84.

8. Idaho: spent $480.00 during 1983 for outside counsel for trustee and foreclosure sales.

9. Illinois: hired outside counsel for forcible detainers; in 1983, the fees totalled $74,268.24; in 1984, the fees totalled $84,384.47.

10. Iowa: in 1983 and 1984, spent $1,313.21 to retain outside counsel to work on eviction proceedings.

11. Indiana: during fiscal year 1983, spent $6,375.00 to retain outside counsel for 51 eviction proceedings; during fiscal year 1984, spent $4,364.06 to retain outside counsel for 25 eviction proceedings; during both '83 and '84, spent $175.00 for outside counsel for three loan closings. The total spent on outside counsel during '83 and '84 was $10,914.06.

12. Louisiana: in 1983 and 1984, spent $44,937.00 in retaining outside counsel for sale closings, recording deeds, foreclosure filings, evictions and sheriff sales and used 49 different law firms.

13. Maine: in 1983 and 1984, spent $9,920.63 in retaining outside counsel for title updates, eviction and foreclosure proceedings and title searches.

14. Maryland: in fiscal year 1983, employed three firms for eviction proceedings and title searches and spent $1,955.00; in 1984; employed 10 firms for title searches, foreclosures and evictions and spent $3,070.00; the total spent on outside counsel was $5,025.00.

15. Massachusetts: during fiscal years 1983 and 1984, employed nine firms in sixty-six actions and spent $3,705.00.

16. Michigan: during fiscal years '83 and '84, employed twenty-eight firms for eviction and foreclosure proceedings and sale closings and spent $80,269.00.

17. Minnesota: during fiscal years '83 and '84, employed outside counsel for loan closings and foreclosures and spent $25,965.00.

18. Missouri: spent approximately $600.00 on outside counsel during fiscal years '83 and '84.

19. Montana: employed fourteen firms for trustee sales, evictions, removing direct loans from bankruptcy and accountings for guardianship actions and spent $3,343.69.

20. New Hampshire: employed nine law firms to perform foreclosure and eviction proceedings and spent $10,833.48.

21. New Jersey: employed thirteen law firms for sale closings and eviction proceedings and spent $32,415.00.

22. New York:

a. Buffalo: only used outside counsel for eviction proceedings at the request of the Loan Guaranty Division; in 1983, four firms were used in nine eviction proceedings for $1,676.33; in 1984, four firms were used in seven eviction proceedings for $500.90.

b. New York: use of outside counsel was limited solely to operation of the loan guaranty program; outside counsel handled 418 evictions and 520 foreclosure sales for fees totalling $221,433.69.

23. North Carolina: employed fourteen firms to handle 83 foreclosure proceedings at the cost of $20,750.00.

24. Ohio: spent $68,444.97 on outside legal counsel during 1983 and 1984; counsel retained for handling sheriff sales.

25. Oregon: spent $2,150 in 1984 for eviction proceedings handled by outside counsel and $681.15 in 1984 for foreclosures handled by outside counsel.

26. Pennsylvania: outside counsel retained only for eviction proceedings; during 1983 and 1984, employed 15 attorneys and spent $47,592.00.

27. Tennessee: employed outside counsel for 169 eviction cases and 2 guardianship cases and spent $17,485.72.

28. Texas:

a.	Waco:	employed five attorneys for forcible entry and detainer actions.
b.	Houston:	spent $19,936.90 on outside legal counsel during 1983 and 1984.

29. Utah: spent $100.00 on outside counsel for two trustee sales.

30. Vermont: retained ten firms for title searches and sale closings and spent $1,957.90.

31. Virginia: retained eighteen firms for foreclosure and eviction proceedings and spent $8,830.00.

32. Washington: began using outside counsel in 1984 and spent $3,802.41.

33. West Virginia: employed outside counsel for two eviction proceedings and spent $416.05.

34. Wisconsin: two fee attorneys employed by the Veterans Administration in connection with the closing of direct loans with specially adapted housing grants in Wisconsin and spent $390.00.

The total spent by all of the reporting officers was $909,765.25.

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-3

ETHICAL PROBLEMS IN FEDERAL AGENCY HIRING OF PRIVATE ATTORNEYS

by

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I. Introduction

While the federal government employs a very large in-house staff of over 17,000 attorneys to handle its legal problems,[1] it nevertheless spends over twenty-five million dollars a year to hire outside counsel to represent its interests.[2] A small part of this yearly amount represents the cost of hiring private attorneys to defend federal employees who have been sued for constitutional torts, when a conflict of interest prevents the Justice Department from representing the employees directly.[3] In these cases the private lawyers do not really "work for" the government any more than defense counsel representing indigent criminal defendants "work for" the government.[4] The government retained private lawyers work for the private client—federal employee or indigent defendant—and the federal government merely pays the fees; the government may not direct or regulate the lawyer's professional judgment.[5] The lawyer's duty is to the client, not to the government.[6]

Various agencies of the federal government hire private attorneys to repre-

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[*] Professor of Law, University of Illinois College of Law. B.A. 1967, J.D. 1970, Harvard University. An earlier draft of this paper was submitted to the Administrative Conference of the United States at its request.

[1] Nat'l L.J., Feb. 4, 1985, at 1; Wash. Post, July 18, 1985, at A22, col. 1.

[2] Nat'l L.J., Feb. 4, 1985, at 1; Legal Times, June 9, 1986, at 2, col. 1.

[3] Legal Times, June 9, 1986, at 6, col. 4.

[4] *See, e.g.,* Polk County v. Dodson, 454 U.S. 312 (1981). *See generally* 2 R. Rotunda, J. Nowak, & J. Young, Treatise on Constitutional Law: Substance and Procedure § 16.4, at 186-190 (1986) (involvement of private actor with government must be more than mere receipt of funds to show state action).

Similarly, while an insurance company may pay for the lawyer, the real client is the insured. Reynolds v. Maramorosch, 208 Misc. 626, 629, 144 N.Y.S.2d 900, 904 (Sup. Ct. 1955); Allstate Ins. Co. v. Keller; American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (Sup. Ct. 1954); *cf.* Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill. 2d 201, 205, 407 N.E.2d 47, 49 (1980) (counsel employed by insurer in malpractice action had both insurer and physician as its clients).

[5] *See* Model Code of Professional Responsibility DR 5-107(B) (1980) ("A lawyer shall not permit a person who . . . employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."); *accord* Model Rules of Professional Conduct Rule 5.4(C) (1983) (same); *id.* Rule 1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation, (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . . ."); *see also* The Florida Bar v. Consolidated Business & Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980) (supervision and control of employee lawyers by nonlawyer officers and stockholders of Florida corporation for sole purpose of personal financial gain was inconsistent with Model Code and constituted unauthorized practice of law); Wood v.

sent, that is, "work for," the government on a variety of matters. These matters range from the Comptroller of the Currency's fight with a private landlord over rent charged to government agencies to the Federal Deposit Insurance Corporation's purchase of seventeen million dollars of private lawyers' time to handle temporary surges of complicated work throughout the country when banks have failed.[7]

Federal agency hiring of private attorneys raises many legal and economic issues involving the statutory authority for such hiring, the economic justifications, and the possible need for controls to prevent abuse of government resources. These issues may be considered elsewhere.[8] In this article, I focus instead on the special problems of legal ethics that such agency hiring creates. The article analyzes the implications of the rules of legal ethics as they apply to private attorneys and the private law firms within which they work, when the particular client happens to be a federal agency or the United States government. I then conclude with suggestions concerning the way in which the private attorneys and government agencies involved should address the issues of professional responsibility.

Georgia, 450 U.S. 261, 269 (1981) (payment of legal fees by employer created potential for conflict of interest in establishing legal precedent requiring sacrificing interests of defendants).

A note on citation form: The American Bar Association (ABA) *Model Code of Professional Responsibility* is divided into three types of statements. The nine "Canons" are "axiomatic norms" that "embody the general concepts from which the Ethical Considerations (EC) and the Disciplinary Rules are derived." The "Disciplinary Rules" (DR) are "mandatory in character"; that is, violations may subject the attorney to discipline up to and including disbarment. The Ethical Considerations, on the other hand, tend to be "aspirational in character" and represent an unenforceable but basic consensus of the profession as to proper lawyer behavior. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statements (1980).

In 1983, the ABA adopted a new model ethical code, called the *Model Rules of Professional Conduct*. The disciplinary rules (or black letter) of the *Model Rules* are cited as MODEL RULES Rule 1.1, etc., while the disciplinary rules of the *Model Code* are cited as MODEL CODE DR 1-101, etc. The commentary to each of the *Model Rules* explains and illustrates the meaning and purpose of the rule. *See* MODEL RULES Scope, comment 9. The ABA did not officially number the comments, but the numbering system that has become frequently used may be found in T. MORGAN & R. ROTUNDA, 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1987).

Virtually every state and federal jurisdiction has adopted some form of either the *Model Code* or *Model Rules* as law. I therefore focus on both the *Model Code* and the more recent *Model Rules*.

[6] In fact, a public defender's actions in representing his or her client are not even "state action." Polk County v. Dodson, 454 U.S. 312, 324-25 (1981). *See generally* 2 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 4, at § 19.17, at 770-71 (1986) (government employment alone does not establish color of state law).

[7] Nat'l L.J., Feb. 4, 1985, at 53. *See also* Freiwald, *Private Lawyers See Riches in Federal Debt Collection*, 9 Legal Times, Feb. 16, 1987, at 1, col. 1 (discussing pilot program privatizing collection of debts to federal government.)

[8] *See generally* Dickinson, *Senate Studies Agencies' Use of Outside Counsel*, Legal Times, June 9, 1986, at 2; *Federal Agency Hiring of Private Attorneys, Public Hearing Before the Administrative Conference of the United States*, May 29, 1986 (unpublished) (on file at *Georgetown Journal of Legal Ethics*) [hereinafter *Public Hearing*].

Because ethical conflicts of interest raise particular concern,[9] it is to those questions that I turn first.

II. CONFLICTS OF INTEREST

A. INTRODUCTION

The importance of the basic federal statutes governing conflicts of interest is reflected by their inclusion in title 18 of the *United States Code*—the criminal title.[10] Federal law, however, does not preempt the field; ethics codes of relevant state jurisdictions also govern.[11] Nor do the federal conflict of interest statutes raise any unique or unusual ethical problems as applied to specially retained private attorneys; the statutes simply apply equally to full-time government attorneys or those private attorneys hired by the government.[12] The federal government cannot avoid the applicability of the federal law simply by contracting out its legal needs. Thus, in this section I will focus primarily on the American Bar Association's *Model Code* and *Model Rules* as they govern the problem of private lawyers retained by the government to work on specific problems, because these provisions—which nearly every jurisdiction has adopted as positive law—raise some special concerns.

It is the obligation of the lawyer to "exercise independent judgment on behalf of a client."[13] The term "conflicts of interests" is a popular one and used in the *Model Rules.*[14] The *Model Code* speaks more of "differing interests," which are said to "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest."[15]

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[9] *Public Hearing*, *supra* note 8, at 58 (testimony of Prof. S. Cohn); *id.* at 68 (testimony of Prof. T. Morgan).

[10] Chapter 11, Bribery, Graft, and Conflicts of Interests, 18 U.S.C. §§ 201-24 (1982). *See generally* Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1.

[11] Special regulations promulgated by an agency would govern its personnel and the people appearing before it. Thus, the Securities and Exchange Commission has taken action to govern the ethics of the lawyers appearing before it. *E.g.*, SEC v. National Student SEC Mktg. Corp., [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,027 (D.D.C. May 2, 1977). *See also* Exec. Order No. 11,222, Prescribing Standards of Ethical Conduct for Government Officers and Employees, 30 Fed. Reg. 6469 (1965), as amended, 3 C.F.R. 306 (1964-65) (reprinted in *Codification of Presidential Proclamations and Executive Orders*, 61-67 (1981)) (applying certain ethics rules to all government employees without regard to whether they are lawyers); Agency Regulations Governing Ethical and other Conduct and Responsibilities of Employees, 5 C.F.R. §§ 735.201-735.210 (1986) (same).

[12] *See infra* note 47.

[13] MODEL CODE Canon 5. *See also* MODEL CODE EC 5-1 ("The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of [the] client and free of compromising influences and loyalties."); MODEL CODE DR 5-101(A) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."); DR 5-104(A) ("A lawyer shall not enter into a business transaction with a client if they have differing interests therein . . . unless the client has consented after full disclosure."); DR 5-105 ("Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer"). *Cf.* MODEL RULES Rules 1.7, 1.8, 1.9. MODEL RULES Rule 1.7 provides in part:

The ethics codes focus on many types of conflicts of interest, most of which do not raise any unique problems of application when the government retains a private attorney. A conflict might exist between a client's and the lawyer's financial, business, property, and personal interests.[16] For example, if the government hired a private attorney to collect a debt, and the debtor was the son or daughter of the private attorney, a possible conflict of interest

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> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversly affected; and
>
> (2) the client consents after consultation. . . .

MODEL RULES Rule 1.8 provides in part:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire . . . pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in a manner which can be reasonably understood by the client; . . . .
>
> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation. . . . .

MODEL RULES Rule 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or (b) use information relating to the representation to the disadvantage of the former client except as rule 1.6 would permit with respect to a client or when the information has become generally known.

As MODEL RULES Rule 1.7 comment 1 provides: "Loyalty is an essential element in the lawyer's relationship to a client."

[14] *E.g.*, MODEL RULES Rule 1.7; MODEL RULES Rule 1.7 comment 1 ("An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.").

[15] MODEL CODE Definitions (1). *See also* MODEL CODE EC 5-14 ("Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.").

[16] *See generally* MODEL CODE EC 5-1 to 5-13 (interests of lawyer that may affect judgment). *See also* MODEL CODE DR 5-101 to 5-104; MODEL RULES Rule 1.7(b), 1.8, set out *supra* note 13.

would exist and the attorney must either refuse to accept the case or must disclose the conflict and secure knowing consent if the conflict is to be waived. The lawyer, in short, would follow normal procedures; the fact that the client is the federal government rather than a local business would raise no special problems and would affect neither the result nor the method of handling the conflict.

The bulk of conflicts issues that raise special problems involve possible differences between the interests of two or more of the lawyer's present clients (simultaneous representation) or between a present client and the lawyer's former clients (subsequent representation).[17] Because such conflicts of interests between present and former clients are enforced not only in disciplinary rules but also by courts during litigation, it is a particularly significant area with much case law development.[18] These types of conflicts—problems of simultaneous representation and subsequent representation—can have somewhat differing applications when the government is the client.

B. SUBSEQUENT REPRESENTATION

There is no general prohibition against a lawyer suing or taking an adverse position to a former client. Because the former client is no longer a client, there is, by definition, no problem of breach of loyalty.[19] If a blanket prohibitory rule were in force, a vast number of lawyers who had ever done any work for any giant corporation or the government would be disqualified systematically in all future, unrelated cases.

While the lawyer's duty of loyalty exists only for a present client, there is a requirement that the lawyer preserve the confidences and secrets of his or her clients,[20] a requirement that continues after the termination of employ-

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[17] MODEL CODE DR 5-105 (titled "Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer"); MODEL CODE DR 5-106 (titled "Settling Similar Claims of Clients"); MODEL CODE EC 5-14, set out *supra* note 15.

[18] *See, e.g.*, Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 270-71 (2d Cir. 1975) (courts have duty and responsibility to disqualify counsel for unethical conduct prejudicial to adversaries).

[19] Of course, there is always the factual question whether the client is a "former" or ongoing client. *See infra* notes 76-93 and accompanying text (discussing this problem in IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978)).

[20] MODEL CODE DR 4-101(A) provides:

> "Confidence" refers to information, protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

MODEL CODE DR 4-101(B) provides:

> [A] lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client. (3) Use a confidence or

ment.[21] The requirement to preserve confidences and secrets applies to government lawyers as well as private attorneys.[22]

The rule requiring disqualification of counsel in certain types of subsequent representation cases is usually based on the need to safeguard against the danger of inadvertent use of confidential information.[23] Judge Weinfeld developed the basic test in the leading case of *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*:[24]

> I hold that the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are *substantially related* to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation

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> secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Model Rules Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

[21] Model Code EC 4-5 provides:

> A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be dilligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

See also Model Code EC 4-6 ("The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment . . . ."); Model Rules Rule 1.6 comment 15 ("After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences . . . ."). *See generally* Waterbury Garment Corp. v. Strata Productions, 554 F. Supp. 63 (S.D.N.Y. 1982). ABA Comm. on Professional Responsibility, Formal Op. 154 (1936) (addresses acceptability of disclosure of nonconfidential information).

[22] Model Rules Rule 1.6 comment 6 ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.").

[23] Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975). *See also* Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 (7th Cir. 1976) (when attorney represents party where adverse party is attorney's former client, attorney will be disqualified if subject matter of two representations substantially related).

[24] 113 F. Supp. 265 (S.D.N.Y. 1953).

> confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.[25]

Judge Weinfeld's "substantial relationship" test for subsequent representation cases has been quoted, relied on, cited, and followed by a host of other court decisions,[26] with the debate in the courts focusing primarily on the definition of "substantial relationship."[27]

The *Model Rules* have sought to codify the case law. They provide that a lawyer who formerly represented a client shall not thereafter represent another "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."[28] In addition, a lawyer may not use the confidential or secret information "to the disadvantage of the former client" unless the information "has become generally known" or unless it is no longer privileged as secret or confidential information.[29]

In all subsequent representation cases, there is the initial blanket requirement in the *Model Code* of vicarious disqualification of all members of the firm if any one member is subject to disqualification.[30] The former client, however, may always waive the disqualification.[31] One lawyer's conflict is imputed to all others in the same firm.

Regarding the former *government* lawyer entering into private practice or a private attorney entering government service—what is often called the revolving door problem—the policy interests regarding subsequent representation and imputed disqualification are somewhat different. Thus the *Model Code*, in DR 9-101(B), provides a special rule regarding subsequent representation in the government setting: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[32] The purpose of this rule is to protect the public by recognizing interests beyond merely confidences or secrets. Thus, DR 9-101(B) is not limited to cases where confidential information is involved, though safeguarding confidences is one of the rationales behind the rule. In addition, while DR 9-101(B) applies only to lawyers, it does not require that the lawyer act as a lawyer while employed by the government. Recognizing that many lawyers have administrative positions which do not involve the practice of law, the rule requires only that the lawyer, while in government service, was "a public employee."[33]

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[25] *Id.* at 268 (emphasis added).

[26] *E.g.*, State v. Phillips, 232 Kan. 625, 656 P.2d 771 (1983); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982).

[27] *Compare* Chugach Elec. Ass'n v. U.S. District Court, 370 F.2d 441, 443 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967) (substantial relationship between issues in present and former cases not dispositive concerning issue of disqualification) *with* American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1130 (5th Cir. 1971) (disqualification not warranted where substantial relationship not shown).

[28] MODEL RULES Rule 1.9(a).

[29] MODEL RULES Rule 1.9(b). *See generally* Morgan, *Conflicts of Interests and the Former Client in the Model Rules of Professional Conduct*, 1980 A.B. FOUND. RES. J. 993.

[30] MODEL CODE DR 5-105(D) ("If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment.").

[31] MODEL CODE DR 5-105(C) ("[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."); *see also* MODEL CODE DR 5-105(D).

The rule was drafted in an effort to meet the special problems of the revolving door between the private sector and government, and thus it is broader than the judicially created subsequent representation rule for private attorneys in the private sector. The policy considerations behind DR 9-101(B) are:

> The treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.[34]

There are nevertheless costs involved with an overly broad interpretation of DR 9-101(B). The rule does not on its face provide for any mechanism for government waiver of its disqualification, and the blanket disqualification is automatically imputed to all other members of the entire law firm.[35] Policy considerations that caution against a broad, nonwaivable, imputable, disqualification rule include:

> The ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service; the rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the rights of litigants to

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[32] MODEL CODE DR 9-101(B).

[33] *Id.*

[34] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342, at 1, 3-4 (1975) (citations omitted). The opinion also states that "[p]erhaps the least helpful of the seven policy considerations mentioned above is that of avoiding the appearance of impropriety." *Id.* at 5 n.17. *See also* Woods v. Covington County Bank, 537 F.2d 804, 814 (5th Cir. 1976) (limitation on former government attorneys avoids charge that position taken by public official in anticipation of private gain).

[35] *See* MODEL CODE DR 5-105(D), set out *supra* note 30.

> obtain competent counsel of their own choosing, particularly in specialized areas requiring special technical training and experience.[36]

The American Bar Association resolved the problem with the language of DR 9-101(B) by allowing the law firms to screen out, by creating a Chinese Wall around, the lawyer disqualified by DR 9-101(B).[37] The fiction used to justify these Chinese Wall mechanisms is to say that the government "consents" provided that there is adequate screening. This consent, however, is itself a fiction because unlike the consent of a private litigant,[38] the government's consent cannot be withheld arbitrarily to secure tactical advantage.[39] That is, if the screening is in place and the Chinese Wall does not leak, then the consent must be granted.

Just as the *Model Rules* incorporated the judicially created subsequent representation rule, they also contained a custom tailored rule for the special conflicts problems of successive private and government employment.[40]

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[36] ABA Formal Op. 342, *supra* note 34, at 4-5 (citations omitted). *See generally* Morgan, *supra* note 10, (urging that former employee's disqualification should not extend to law firm or organization); Lacovara, *Restricting the Private Law Practice of Former Government Lawyers*, 20 ARIZ. L. REV. 369 (1978) ("Excessively stringent ethical rules should not defeat their own purposes by severely hampering the government's ability to obtain competent legal counsel.").

[37] *Supra* note 32 and accompanying text; *infra* note 38 and accompanying text.

[38] MODEL CODE DR 5-105(C).

[39] Kesselhaut v. United States, 555 F.2d 791, 794 (Ct. Cl. 1977). *See also* Kadish v. Commodity Futures Trading Commission, 548 F. Supp. 1030, 1035 (N.D. Ill. 1982) (court will look beyond government waiver of disqualification and examine effectiveness of "screen").

[40] MODEL RULES Rule 1.11 provides:

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultations. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
>
> (b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.
>
> (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
>
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
>
> (2) negotiate for private employment with any person who is involved as a party or

Under rule 1.11, if a lawyer worked for a government agency on a particular "matter," that is, a contract, claim, judicial proceeding or other matter involving specific parties,[41] and his or her involvement in the matter was "*personal*," that is, not vicarious,[42] and was "substantial,"[43] that is, his or her involvement was material, clear, and weighty,[44] then the lawyer may not subsequently represent a private client in connection with that matter, even if that representation is not adverse to the government.[45] The law firm may represent the client, however, if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee.[46] The law firm must notify the appropriate government agency promptly so that it can approve of the screening and consent.[47] Similarly, the private lawyer must not use confidential government information; if he or she has such information, the lawyer must be screened from firm matters where it is relevant.[48] In addition, the government attorney may not participate in a matter for the government in which he or she had participated personally and substantially while in earlier nongovernmental service.[49]

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as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which at the time this rule is applied the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

[41] MODEL RULES Rule 1.11(d)(1), set out *supra* note 40.

[42] MODEL RULES Rule 1.11(a), set out *supra* note 40.

[43] MODEL RULES Rule 1.11(a), set out *supra* note 40.

[44] MODEL RULES Terminology [10] ("'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance.").

[45] Kessenich v. Commodity Futures Trading Comm'n 684 F.2d 88, 98 (D.D.C. 1982).

[46] MODEL RULES Rule 1.11(a)(1), set out *supra* note 40.

[47] MODEL RULES Rule 1.11(a)(2), set out *supra* note 40.

[48] MODEL RULES Rule 1.11(b), set out *supra* note 40. *See also* Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973) (disqualification of attorney based on prior employment pursuant to Securities Investor Protection Act included all members of firm—disqualified attorney's knowledge imputed to his partners).

[49] [Model Rules] Rule 1.11(c)(1), set out *supra* note 40. The status of the private lawyer retained by the government—whether the lawyer is a special government employee or an independent contractor is irrelevent for purposes of rule 1.11. *See Public Hearing*, *supra* note 8, at 57 (testimony of Prof. S. Cohn); *id.* at 63, 69 (testimony of Prof. T. Morgan). Similarly, it is unimportant for purposes of 18 U.S.C. §§ 201-24 (1982). The government cannot avoid the requirements of § 207 or other sections by retaining private attorneys. The distinctions of special employee or independent contractor are not relevant for purposes of legal ethics. As Prof. Morgan has concluded:

> The special government employee issue does kick in some of the other conflict of interest

Rule 1.11 and section 207 of title 18 do not prevent a federal employee from handling a case for the federal government after he or she has left the government, if the particular agency wants to hire him or her.[50] It has been suggested, however, that there should be a rule prohibiting a former employee from being hired to represent the agency or that at least the former employee should be screened from participation and remuneration if the former employee's law firm takes the case.[51] One has no idea how often this situation occurs, if ever. In any event, this per se prohibition is not necessary. Certainly, a government agency may engage in favoritism in hiring a particular attorney. Whenever an agency has the power to engage in sole source bidding, there is always that problem, and the way such dangers are reduced is by strict controls, accounting, and oversight. The blanket prohibition of one class of individuals—those who have developed special expertise in a complex area—may lull one into believing that the problem of favoritism has been solved when it leaves open all the other types of corrupt favoritism, e.g., hiring an individual because he or she is a well-connected politician or rainmaker, or even a relative.

The former government attorney who works, while in private practice, for the agency in which he or she had worked while a government attorney violates none of the policy reasons which led to the screening device of rule 1.11.[52] There is no treachery of switching sides, for the lawyer stays on the same side. There is no need to safeguard the use of confidential information

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> statutes, but I think that you'll find that the distinction between special government employee and independent contractor, as a practical matter for what it limits a person's doing and what it doesn't limit their doing, is relatively minor. That is to say, if you're a special government employee, you can't take the same case again as a private lawyer, for example. But you couldn't do that anyway even if you were an independent contractor under the legal ethics rules.

Public Hearing, supra note 8, at 63 (testimony of Professor T. Morgan).

Thus I will not focus on the nuances of 18 U.S.C. § 207 and related federal statutes in chapter 11 of title 18. The discussion does not relate to my main issue of exploration: to what extent are legal ethics rules applicable in a special way to private attorneys retained by the government.

Under 18 U.S.C. § 209(a), if a private attorney hired by a federal agency is treated as a "regular Government employee," then that person could not receive any other compensation from his law firm or any other source. A private lawyer hired by an agency should be treated as an independent contractor or a "special Government employee." 18 U.S.C. § 202(c) (1982).

[50] MODEL RULES Rule 1.11 governs the former government lawyer who represents a "private client" after leaving the government. *See supra* note 40. 18 U.S.C. § 207 explicitly exempts from its coverage representation of the United States.

[51] *Public Hearing, supra* note 8, at 70 (testimony of Prof. T. Morgan).

[52] MODEL RULES Rule 1.11 comment 1 (This rule prevents a lawyer from "exploiting public office for the disadvantage of a private client."). For text of rule 1.11, see *supra* note 40. *Cf.* Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981) (law firm not disqualified from representing receiver for corporation in suit against SEC because attorney at firm had been SEC assistant director; court found taint and possible appearance of impropriety insufficient reason for disqualification).

because the very same agency that generated the confidential information is the one using it.[53] There is no great problem of the government lawyer handling a particular matter to enhance his or her own future employment in the private sector because the agency will have no desire to hire the former government attorney unless he or she handled the case very well, and that kind of encouragement does not hurt the government. To be sure, there is always the danger that the government lawyer will seek to become indispensable, to keep others from having knowledge of the case, so that when he or she leaves government service the agency will have no where else to turn. That problem, however, should be met head on: The agency should have procedures to guard against too much dependence on any one individual who can always leave, become ill, or die.

C. SIMULTANEOUS REPRESENTATION

The primary rationale behind the simultaneous representation rule is the need to protect client loyalty. If a lawyer is representing *A* in a matter adverse to *B* (e.g., divorce), and is simultaneously representing *B* in another matter (e.g., house closing), client *B* will rightly feel that her attorney is not completely loyal to her. Moreover, the other parties should be equally concerned.[54] In the above hypothetical, for example, there may be a diminution in the vigor of the lawyer's representation of client *A* in the divorce, if the lawyer really is loyal to client *B* because of the other representation (the house closing), and wishes to curry favor with client *B* and earn her future business.

Because of the concern in the diminution in loyalty, the applicability of the disqualification created by simultaneous representation of adverse interests applies even if there is no danger that the lawyer might breach a client's confidences; nor is it necessary that the two cases even be substantially related in order for a disqualification to exist. In *Grievance Committee v.*

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[53] *Contrast* General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) (former lawyer for Antitrust Division of Department of Justice now in private practice may not now represent City of New York in antitrust matter against General Motors; attorney had substantial responsibility for antitrust case similar to one City hired him for in contingent fee arrangement; City treated as private client of lawyer in private practice).

[54] *E.g.*, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976) (adverse representation of existing client prima facie improper), *infra* notes 57-97 and accompanying text; *In re* Kelly v. Greason, 23 N.Y.2d 368, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968) ("[W]here divided loyalties exist, a lawyer may inadvertently and despite the best of motives, be influenced and act detrimentally to the client, or the appearance of misconduct is unavoidable."); Jeffry v. Pounds, 67 Cal. App. 3d 6, 136 Cal. Rptr. 373 (Cal. Ct. App. 1977) (condemning acceptance of employment adverse to client even though employment unrelated to existing representation); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 232-33 (2d Cir. 1977) (avoiding prejudice in action involving adverse representation of existing client "was a goal impossible to achieve.").

Rottner,[55] for example, a law firm accepted an assault and battery case for O'Brien and against Twible. At the same time it was representing Twible in a collection matter against Houghton. The cases were not at all related but the court concluded:

> When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money.[56]

While some courts appear to be more flexible than others in subsequent representation cases, many courts—at least on a general level—seem to apply a fairly inflexible, mechanical disqualification in simultaneous representation cases. Simultaneous representation of different clients in different and adverse matters—e.g., litigation, arbitration, or a rulemaking proceeding—even though one representation is not at all related to the other, is virtually prohibited; even consent of the clients may not cure the defect.

Consider the approach of the Court of Appeals for the Second Circuit. While it has shown some flexibility in the subsequent representation cases,[57] it has been most strict and inflexible in the simultaneous representation cases. This point is illustrated by *Cinema 5, Ltd. v Cinerama, Inc.*[58] One attorney, Manly Fleischmann, was a partner in the Buffalo law firm of Jaeckle, Fleischmann & Mugel.[59] He was also a partner in the New York City law firm of Webster, Sheffield, Fleischmann, Hitchcock & Brookfield.[60] In January, 1972, the Buffalo law firm began representing Cinerama and other defendants in an antitrust suit alleging monopolistic licensing of motion pictures in the Rochester area.[61] This suit was brought in the Western District of New York.[62] The Buffalo law firm also represented Cinerama in a similar suit involving the Buffalo area.[63] That suit began in March, 1974, and was also brought in the Western District of New York.[64]

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[55] 152 Conn. 59, 203 A.2d 82 (1964).

[56] *Id.* at 65, 203 A.2d at 84. *See also In re* A.H. Robins, Co., No. 85-010307-R, slip. op. (Bankr. E.D. Va., Oct. 29, 1986), discussed in 7 BUS. LAW. UPDATE, Jan./Feb. 1987, at 1, col. 3, (ABA Sec. of Corp., Banking & Bus. Law) (law firm disqualified from continued service as bankruptcy counsel to A.H. Robins Co. because that law firm had provided, and intended to continue to provide, advice on narrow range of unrelated corporate matters to Aetna Life & Cas. Co. second largest creditor of Robins).

[57] Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 756-757 (2d Cir. 1975) (peripheral representation exception for subsequent representation cases).

[58] 528 F.2d 1384 (2d Cir. 1976).

[59] *Id.* at 1385.

[60] *Id.*

[61] *Id.*

[62] *Id.*

While those two suits were still pending—that is, while Cinerama was still a client of the Buffalo firm—the New York firm, representing Cinema 5, Ltd., sued Cinerama in the Southern District of New York alleging a conspiracy among the defendants to take over Cinema 5, Ltd.[65] The Buffalo firm was not involved in the Southern District action and the New York firm was not involved in the Western District action. Cinerama was not a client of the New York City firm; it was a client only of the Buffalo firm. The only connection between the two separate firms was Mr. Fleischmann, and Mr. Fleischmann was apparently personally involved only in the Buffalo litigation. His personal participation in the Buffalo litigation "was minimal, and we [the court] are confident that he would make every effort to disassociate himself from both lawsuits and would not divulge any information that came to him concerning either."[66]

Notwithstanding all of these mitigating circumstances, the Southern District court disqualified the New York City firm. On appeal the New York City firm argued that "there is nothing substantial in the relationship between an upstate New York conspiracy to deprive local theatre operators of access to films and an attempted corporate takeover in New York City."[67] The Second Circuit did not dispute this argument but found it irrelevant.[68]

The court began its analysis by agreeing that the "substantial relationship" test is the one used to determine whether a lawyer may accept employment against a former client. The court distinguished the present case, stating "[h]owever, in this case, the suit is not against a former client, but an existing one."[69] Though noting that it intended no criticism of the character and personal integrity of the lawyers involved,[70] the *Cinema 5* court concluded:

> [T]he substantial relationship test does not set a sufficiently high standard by which the necessity for disqualification should be determined. That test may properly be applied only where the representation of a former client has been terminated and the parameters of such relationship have been fixed. Where the relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the

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[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1387 n.1.

[67] *Id.* at 1385.

[68] *Id.* at 1386. The court stated that "the propriety of [simultaneous representation] must be measured not so much against the similarities in litigation as against the duty of individual loyalty which an attorney owes to each of his clients." *Id.*

[69] *Id.* at 1386.

[70] *Id.* at 1387.

> very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden. . . .
> "Because an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests," this requires his disqualification. Moreover, because of the peculiarly close relationship existing among legal partners, if Mr. Fleischmann is disqualified, his partners at the Webster firm are disqualified as well.[71]

The strictness of the *Cinema 5* rule is illustrated by the fact that after learning of the conflict, the Buffalo firm offered to withdraw its representation of Cinerama in the Western District actions.[72] Cinerama did not accept that offer of withdrawal, and the district court and the Second Circuit still disqualified the New York City firm.[73] Moreover, even if Cinerama had accepted the withdrawal of the Buffalo firm's representation in the Western District actions, Cinerama probably still could have forced the withdrawal of the New York City firm. Although Cinema 5, Ltd., could argue that Cinerama's acceptance of the Buffalo firms withdrawal would amount to consent, the rationale of the simultaneous representation rule is that adverse representation is a violation of the duty of loyalty to the client; even with consent in such circumstances, the attorney should not profit from breach of the duty of loyalty.[74] The *Cinema 5* rule has broad support in the case law.[75]

In *Cinema 5* both matters involved litigation, but that fact is not a necessary element for the simultaneous representation rule to apply. *IBM Corp. v. Levin*[76] made that point clear. The Third Circuit upheld the district court's disqualification of a law firm from further representation of plaintiffs Levin et al.[77] In *Levin*, the law firm of Carpenter, Bennett & Morrissey (CBM) represented Levin and filed suit against IBM in June, 1972, alleging antitrust violations.[78] CBM had represented Levin, and corporations with which he was associated, for a number of years.[79] In April, 1970, CBM wrote an opinion letter for IBM on a labor law problem. CBM accepted two other labor law assignments from IBM in July, 1970 and May, 1971.[80] In April, 1972, CBM accepted another labor law assignment from IBM and (according to CBM), brought to IBM's attention the possible conflict in that CBM was contemplating an antitrust suit against IBM.[81] CBM said it then secured consent from IBM (which IBM later denied) and from Levin.[82] During CBM's prosecution of the antitrust suit against IBM, CBM accepted four additional nonlitigative labor relations assignments from IBM, one in February, 1974, one from June, 1974 to August, 1976, and two in June and July 1976.[83]

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[71] *Id.* at 1387 (citations omitted) (emphasis in original).

[72] *Id.*

[73] *Id.*

[74] Fordham, *There Are Substantial Limitations on Representation of Clients in Litigation which Are Not Obvious in the Code of Professional Responsibility*, 33 Bus. Law. 1193, 1204 (1978). *See also* Kelly v. Greason, 23 N.Y.2d 368, 374-379, 244 N.E.2d 456, 459-62, 296 N.Y.S.2d 937, 942-46 (1968) (lawyers may not represent claimants of insurance carrier while simultaneously one of lawyers also carrier's employee; discipline appropriate unless and perhaps even if consent obtained from both clients after full disclosure); *In re* Boone, 83 F. 944, 952 (N.D. Cal. 1897) ("[C]lient may waive a privilege which the relation of attorney and client confers upon him, but he cannot enter into an agreement whereby he consents that the attorney may be released from all the duties, obligations, and privileges pertaining to the relation of attorney and client.").

[75] *E.g.*, Grievance Comm. v. Rottner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964), *supra* note 53 and accompanying text; Jeffry v. Pounds, 67 Cal. App. 3d 6, 136 Cal. Rptr. 373 (Cal. Ct. App. 1977) (Cal. Rule 5-102(B) violated when, without knowledge and consent of current client, lawyer undertakes to represent third person suing client on unrelated matter).

[76] 579 F.2d 271 (3d Cir. 1978).

[77] The court also affirmed the district court's order ameliorating the hardship of the disqualification by permitting the disqualified counsel to turn over its work product to new counsel and to consult with new counsel for 60 days. *Id.* at 283.

In June, 1977, five years after the antitrust suit was filed, IBM moved to disqualify CBM from representing Levin et al. in the antitrust suit.[84] The district court disqualified CBM and the Third Circuit affirmed.[85]

The court rejected the argument that IBM had constructive notice of CBM's representation of Levin.[86] Although IBM's labor lawyers knew of CBM's representation of IBM, and IBM's antitrust lawyers in the same department knew of CBM's representation of Levin, this constructive notice was found not to meet the requirements of DR5-105(C): "Clearly, full and effective disclosure of all the relevant facts must be made and brought home to the prospective client."[87]

CBM also argued that actual consent had been obtained from IBM. Even accepting CBM's version of the facts, the district court determined that they did not constitute "full and adequate disclosure as required by DR 5-105 . . . ."[88] The Third Circuit affirmed this ruling, though IBM was hardly a callow youth or befuddled widow.

While it was clear that CBM had an ongoing relationship with Levin, there still was the question whether CBM had such an ongoing relationship with IBM.[89] Both the district court and the circuit court found that IBM was in fact a client of CBM because of the pattern of legal assignments:

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[78] *Id.* at 274.
[79] *Id.* at 275.
[80] *Id.* at 276.
[81] *Id.*
[82] *Id.* at 277.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 283.
[86] *Id.*
[87] IBM Corp. v. Levin, 579 F.2d at 282 (footnote omitted). MODEL CODE DR 5-105(C), set out *supra* note 31.
[88] *Id.*
[89] *Id.*

> Although CBM had no specific assignment from IBM on hand on the day the antitrust complaint was filed and even though CBM performed services for IBM on a fee for service basis rather than pursuant to a retainer arrangement, the pattern of repeated retainers, both before and after filing of the complaint, supports the finding of a continuous relationship.[90]

Having concluded that CBM represented both IBM (in rendering legal advice in some labor matters) and Levin (in an antitrust suit), the Third Circuit found it irrelevant that the two cases were not at all related.[91] The court cited and quoted with approval from *Cinema 5*,[92] and held that CBM must be disqualified because of its simultaneous representation of Levin and IBM;[93] the court required disqualification even though the two cases were completely unrelated and CBM never acquired any confidential information from IBM useful to the Levin antitrust suit.

As *Levin* illustrates, a lawyer might find that an occasional client is a continual one for disqualification purposes and that informal consent is not sufficient to cure the ethical defect. At the least, consent should be obtained in writing to bring home to the client the seriousness of the matter. The rule of *Levin* should apply equally to the private lawyer retained by the government. If consent will cure the defect, then the need for, and fact of, consent should be brought home to the client. If consent is not presumed for even a large, sophisticated corporation like IBM, then it is unlikely a court will presume governmental consent. If consent is needed, it must be clearly obtained.

As *Cinema 5* and other cases in this area illustrate, a lawyer may find his or her firm disqualified because one part of the firm is representing a client who is being sued by another part of the firm in a completely unrelated matter. Because the two matters are completely unrelated, there may be no danger of a leak of confidential information—a danger that furnishes the common rationale for the subsequent representation cases discussed above.[94] Nevertheless, this fact does not reduce the need for disqualification: In simultaneous representation cases there is always the danger of divided loyalties that might cause a lawyer to temper zealous representation of one of the two clients. The lawyer's possible desire to retain the patronage of one client might serve to diminish the vigor of his representation of the other client.

Will the broad, mechanical application of *Levin* mean that if lawyer *A* is retained or appointed to represent a criminal defendant in a federal case, that lawyer *A* (or another lawyer in lawyer *A*'s firm) may not simultaneously represent the Federal Deposit Insurance Corporation (FDIC), which is part of the federal government, in an unrelated case?[95] Alternatively, may lawyer *A* represent the FDIC in collecting assets in a bank foreclosure, while lawyer *A* (or another lawyer in *A*'s firm) represents a private client in a rulemaking before the FDIC (or a completely different agency, e.g., Federal Communication Commission)?

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[90] *Id.* at 281.

[91] *Id.*

[92] *Id.* at 280.

[93] *Id.* at 283.

[94] *See supra* notes 19-30 and accompanying text.

In such cases, ths primary question is, who is the client? Is it the FDIC or the federal government? The simultaneous representation rule does not even begin to apply unless one first determines who the client is. "Client identity is ambiguous, continuously problematic, and requires resolution by conscious choice."[96]

1. Appearance of Impropriety

Some commentators have argued for a broad and strict application of the conflicts rules as applied to attorneys who work for the government and in private practice.[97] Some courts and commentators often focus on the problem of the "appearance of impropriety," which is found in the title to DR 9-101 but not in any disciplinary rule.[98] Lawyers are sometimes disqualified from representing a client because "the conduct under scrutiny must therefore be evaluated in an 'eye of the beholder' context, and the lawyer must be disqualified when an actual appearance of evil exists, though there be no proof of actual evil."[99]

Reliance on the term "appearance of impropriety" should not substitute for careful analysis and interpretation of the *Model Code*. As the court carefully noted in *Fund of Funds, Ltd. v. Arthur Andersen & Co.*:[100] "When dealing with ethical principles . . . we cannot paint with broad strokes. The lines are fine and must be so marked . . . . [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent."[101]

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[95] *See Public Hearing*, *supra* note 8, at 58-59 (testimony of Professor S. Cohn).

[96] G. HAZARD, ETHICS IN THE PRACTICE OF LAW 43-44 (1976).

[97] *Cf.* Freedman, *For a New Rule*, 63 A.B.A. J. 724 (1977) (discussing difficulty in articulating adequate standards for screening disqualified attorney from others in firm).

[98] *See* MODEL CODE DR 9-101 ("Avoiding Even the Appearance of Impropriety."). The title to canon 9 is: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Titles are not disciplinary rules, but "statements of axiomatic norms." MODEL CODE Preliminary Statement.

[99] Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978). *See also* Emle Indus., Inc. v. Pantentex, Inc. 478 F.2d 562, 571 (2d Cir. 1973) (attorney must be disqualified where he "*might* have acquired information" during previous employment related to the subject matter of his subsequent representation) (emphasis in original); Marketti v. Fitzsimmons, 373 F. Supp. 637, 639 (W.D. Wis. 1974) ("Proof that no confidential information had been obtained would not remove the taint of disloyalty.").

[100] 567 F.2d 225 (2d Cir. 1977).

[101] *Id.* at 227 (footnote omitted) (quoting United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955)). As Professor Wolfram has remarked, the charms of the appearance of im-

While the undefined maxim regarding the "appearance of impropriety" may be found in the ethical aspirations,[102] it is significant that no disciplinary rule requires that a lawyer avoid the "appearance of impropriety." In Formal Opinion 342, the American Bar Association has warned that if the "appearance of impropriety" guidelines had been made a disciplinary rule, "it is likely that the determination of whether particular conduct violated the rule would have degenerated . . . into a determination on an instinctive, or even *ad hominem* basis . . . ."[103] Courts have acknowledged, for example, that the "appearance" test "should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules."[104] The "appearance" maxim is not a rule in itself; it is a reason why the *Model Code* sometimes draws mechanical and absolute rules, e.g., those dealing with the commingling of trust funds. Lawyer conduct that does not violate a disciplinary rule, however, should not be vulnerable to discipline because of someone's *ad hoc* belief that it looks bad to the layperson. A lawyer's defense of a guilty man may appear improper to the layperson, yet it is an ethical duty.[105]

It is interesting to note that the *Model Rules* reject the use of "appearance of impropriety." The drafters thought the term too loose and vague; it gave no fair warning; and it encouraged instinctive, *ad hominem* judgments. Nowhere do the *Model Rules* use that term. A definition of "appearance of impropriety" depends on a prior definition of "impropriety," and the *Model Code* defines neither term.[106]

Moreover, excessively strict conflicts rules are not cost free. They bring with them many disadvantages. There are severe costs to the public interest in making it unreasonably difficult for attorneys in private practice to representing the government. For example, an overly restrictive rule makes it very difficult for the government to recruit and retain private attorneys even when that route is the most economically efficient one for the government to

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propriety rationale "are only surface." C. Wolfram, Modern Legal Ethics § 7.1.4, at 319 (1986).

[102] Model Code EC 9-3 ("After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility before his leaving, since to accept employment would give the apearance of impropriety even if none exists."); Model Code EC 9-6 ("Every lawyer owes a solemn duty to uphold the integrity and honor of his profession . . . and to strive to avoid not only professional impropriety but also the appearance of impropriety.").

[103] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), at 5 n.17 (reprinted in T. Morgan & R. Rotunda, Problems and Materials on Professional Responsibility 109 n.17 (3d ed. 1984).

[104] International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975).

[105] Model Code EC 2-29 (compelling reasons justifying exclusion from undertaking representation do not include "the belief of the lawyer that the defendant in a criminal proceeding is guilty.").

[106] R. Rotunda, Professional Responsibility 17 (1984).

take. It places severe burdens and opportunity costs on any law firm which accepts a government retainer, because it precludes the firm from accepting other clients. Because lawyer disqualification is typically imputed[107] to all other lawyers in the firm, an overly broad conflicts rule also restricts the lateral mobility of lawyers among firms.[108] It deprives the government of views from the outside. It deprives private sector lawyers of the benefits of government service, including the opportunity to acquire public service perspectives.[109]

2. Agency-Specific Disqualification

The demarcation of proper boundaries must be done carefully on the basis of sound policy reasons rather than mere *ad hominem*, or instinctive reactions. Two cases illustrate the relevant distinctions, *Zuck v. Alabama*[110] and *People v. Crawford Distributing Co.*[111]

In *Zuck*, a law firm represented a defendant in a criminal case and also represented the prosecutor being sued in his *personal* capacity in a completely unrelated civil matter. The court held that there was an actual conflict of interest rendering the criminal trial unfair in the absence of the criminal defendant's knowing and intelligent waiver.[112]

The rule in *Zuck* is sound because the simultaneous representation involved a realistic and direct problem of lessened zeal. If a law firm represents the prosecutor in a personal matter and represents the defendant in a criminal matter brought by the prosecutor, there is a real danger of divided loyalty. Though no breach of confidences is involved, there is the reasonable possibility that the law firm will be less zealous in the criminal case—and less likely to attack the prosecutor's motives or tactics—because the prosecutor is also its client. Because the law firm is less likely to launch a personal attack on its own client (the prosecutor), the conflict of interest of the particular lawyer representing the prosecutor is automatically imputed to the entire firm, which should be disqualified.[113] The creation of a Chinese Wall, which is sometimes allowed in the subsequent representation cases,[114] does not apply. Although the entire law firm is disqualified, a realistic concern about diminution in loyalty and zeal justifies imputation of the conflict.

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[107] *See* MODEL CODE DR 5-105(D); Rule 1.7, Rule 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2."), set out *supra* note 13.

[108] *See* MODEL CODE DR 5-105(D); *id.* DR 9-101(B), MODEL RULES Rule 1.11. While attorneys can create "Chinese Walls," the erection of walls is a burden, and if the erection is unnecessary and not justified by sound policy reasons, the burden created is equally unnecessary. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975). Moreover, the Chinese Wall involving the revolving door between Government service and private practice is only applicable in subsequent representation cases, not simultaneous representation cases. *See generally* C. WOLFRAM, *supra* note 76, § 7.6.4, at 401-401 (1986).

[109] *Cf.* Morgan, *supra* note 10, at 50-56.

[110] 588 F.2d 436 (5th Cir. 1979).

[111] 65 Ill. App. 3d 790, 382 N.E.2d 1223 (1978).

[112] *Zuck*, 588 F.2d at 440.

Moreover, there is also no significant countervailing interest in favor of permitting the dual representation. If the law firm were already representing the prosecutor, the criminal defendant could simply retain other counsel. In addition, if the law firm were already representing the criminal defendant, it should not accept the prosecutor's offer of employment. The conflict rule in *Zuck* did not place any severe burden on plaintiff or defendant, and it did not disqualify the lawyers from a whole class of representation.

In *Crawford Distributing*, beer distributors were convicted of fixing prices. On appeal, they claimed that their convictions were tainted because the defendants were represented by lawyers in a firm in which at least one member was a special assistant attorney general for nonantitrust civil proceedings. The majority found no conflict:

> If [the Special Assistant Attorney General], whose authority does not include criminal cases, takes on the representation of a person charged in a criminal proceeding in which the Attorney General is involved, that attorney is not placed in a position . . . where he might have to cross-examine and impeach his own clients. Neither is he placed in a position . . . where his civil clients stand to gain by the conviction of the individual he represents in the criminal case. The Special Assistant Attorney General for limited civil types of cases owes no duty to the Attorney General in criminal matters.[115]

The court's conclusion is sound. It is unrealistic to believe that the State Attorney General would choose a private law firm to represent it in various civil matters because the firm would thereby be more likely to represent incompetently their criminal clients and "take a fall" in criminal cases. The danger of diminution in zeal in the facts of *Crawford Distributing* is not real. However, if the law firm could not represent any criminal defendants or could not represent any civil clients in other unrelated civil matters—e.g., a lawsuit to determine the amount of just compensation due a store owner in a condemnation case, while the Special Assistant Attorney General handled only civil tax fraud cases against farmers—then there will be fewer lawyers available to be retained by the state. These lawyers will charge more because the supply of lawyers has been artificially constricted while the demand is constant. Civil clients, too, will suffer. When they hire a lawyer in a civil matter (e.g., a civil service suit against the government), they preclude the lawyer from accepting any other work from the government (e.g., representation of the FDIC). If so, that lawyer may be unwilling to take future civil cases. Such burdens are acceptable if they are the price of sound benefits. The *Crawford Distributing* court did not find any sound benefits from an overly strict conflict of interest rule.

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[113] MODEL CODE DR 5-105(D); MODEL RULES Rule 1.7, Rule 1.10(a).

[114] *See* MODEL RULES Rule 1.11.

[115] 65 Ill. App. 3d at 795, 382 N.E.2d at 1228.

The *Model Rules* appear to recognize the ambiguity existing in the *Model Code*, because the *Model Rules* now provide that "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."[116] This rule for large economic enterprises in the private sector should apply equally to the government. In other words, in determining who the "client" is for purposes of the simultaneous representation rule, the usual presumption should be that the *particular agency* rather than the federal government is the client unless, for some other reason, a sound basis exists for concluding that there is a reasonable expectation of diminution in the lawyer's zeal on behalf of a client. For example, if two or more agencies have a close community of interests in a particular matter—the Department of Justice and the Federal Trade Commission on a certain trade issue, for example, the "client" for purposes of the simultaneous representation rule should be the agencies with that close community of interests.

3. Simultaneous Representation of Non-Adverse Clients

In the above cases, where one of the matters involves representation adverse to a present client, the law firm representing, for example, the FDIC in a litigative matter, should not be able simultaneously to represent a private client suing that particular agency, or a private client seeking some benefit before that *same* agency—e.g., a rulemaking proceeding before the FDIC. Such is the learning of cases like *IBM Corp. v. Levin*.[117] Courts often opine that even consent of both clients cannot waive the conflict because of the interest of the judicial system in vigorous representation of each client.[118] If neither representation involves any adverse setting—e.g., the law firm provides an opinion letter to the FDIC on a labor law issue while simultaneously providing a banking opinion to a banking client—the analysis is somewhat different.

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[116] MODEL RULES Rule 1.7 comment 2.

[117] 579 F.2d 271 (3d Cir. 1978). *See supra* note 64 and accompanying text (discussing *IBM Corp. v. Levin*).

[118] *E.g.*, Kelly v. Greason, 23 N.Y.2d at 374-79, 244 N.E.2d at 459-62, 296 N.Y.S.2d at 942-46 ("Where the circumstances establish such delicate conflicting relationships and inescapable divided loyalties that the likelihood alone of improper conduct or motivation, without any showing of harm and regardless of disclosure and consent, may give rise to professional misconduct."); *In re* Boone, 83 F. at 956 ("I am firmly of the opinion that a contract, or waiver, or release, or consent, or by whatever name it may be styled, by which it is sought to release an attorney from all the duties, burdens, obligations, and privileges incident to the relation, is totally inoperative and void, and contrary to public policy.") (Morrrow, J.). *Cf.* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 228-29 (7th Cir. 1978) (simple consent by client to representation of adverse party not a defense to former client's motion for disqualification based on possibility that confidential information will be used against former client).

The law firm must determine initially if there is any realistic likelihood that the interests of one client would really be adverse to another concurrent client. If there are no adverse interests in existence or likely to develop, there is no simultaneous representation problem.[119] The law firm simply represents multiple clients. If there are adverse interests, there is a simultaneous representation problem but the law firm may be able to represent both clients (the private client and the government agency) *if* both clients consent after full disclosure *and* the lawyer reasonably believes that his or her independent judgment will not be compromised.[120] Because neither matter involves litigation, the conflict is subject to waiver and the courts normally will allow each party to consent to the multiple representation. Because neither matter involves litigation, there is not the same danger of a breach of loyalty existing when the lawyer is suing a present client. If the interests later unexpectedly become so adverse that the lawyer must later withdraw, withdrawal does not cause serious prejudice of the clients' interests because neither matter involves litigation, and, by hypothesis, there is no tribunal to disrupt.[121]

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[119] MODEL CODE DR 5-105(B); MODEL RULES Rule 1.7(a), 1.7(b).

[120] MODEL CODE DR 5-105(C); MODEL RULES Rule 1.7(a)(1), 1.7(b)(1).

[121] MODEL CODE EC 5-15 provides:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing; withdrawal is less likely to have a disruptive effect upon the causes of his clients.

MODEL RULES Rule 1.7 comments 10-12 provide:

> [10] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.
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> [11] For example, a lawyer may not represent multiple parties to a negotiation whose

III. Bargaining for Legal Fees

Some have argued that it is unseemly for the government to bargain with law firms and to seek fee concessions when hiring private attorneys.[122] Indeed, it has been suggested that fee concessions would invite potential malpractice because law firms, in a search for profits, would use the least experienced and least expensive junior associates to handle complex legal problems.[123]

The argument is amusing. Lawyers already have the ethical duty to render competent legal services,[124] a duty that the client cannot waive,[125] and a duty which is enforced by private malpractice actions.[126] What the no fee concession argument says is that lawyers must be paid to be ethical. If they are not paid what they believe they "should" be paid, then they will cut corners to raise profit margins to earn what they "should earn." But if a lawyer is already undeterred by a malpractice action and fear of discipline, and fear that a knowledgeable client will detect poor quality, that lawyer probably is already offering shoddy service to increase his or her profit

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> interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.
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> [12] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[122] Various attorneys have privately told me that they believe it "unethical" for the government to seek fee concessions. *See also Public Hearing, supra* note 8, at 62 (testimony of Prof. T. Morgan referring to this argument).

[123] ABA Comm. on Professional Ethics and Grievances, Formal Op. 302 (1961) ("When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the services rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient.").

[124] Model Code EC 6-1 ("[A] lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle."); Model Code EC 6-6 ("A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice . . . ."); Model Code DR 6-101(A)(1) ("A lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle . . . .").

[125] Model Code EC 6-6; *id.* DR 6-101 (A)(1); Model Code DR 6-102(A) ("A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.").

[126] *E.g.*, Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979) (in attorney malpractice action, attorney could be found to have had duty to refer client to specialist or recommend assistance of specialist).

margin.[127]

There is no provision in the present *Model Code* or *Model Rules* setting any minimum fee, and if there were one, it would violate the antitrust laws.[128] There is also no rule prohibiting lawyers from charging discriminatory fees; that is, a lawyer may charge client *A* more than client *B*, because client *B* is a relative of another lawyer[129] or cannot afford as much.[130] If a lawyer can charge client *B* less because that client can afford less, then the lawyer must be charging client *A* more because that client can afford more. Charging someone less because of poverty is simply the other side of the coin of charging someone more because of affluence. If the ethics rules allow such price discrimination when instituted by lawyers, there can hardly be an ethical proscription when a client bargains for lower fees because the client supplies a steady stream of business.

It is common practice for lawyers representing insurance companies in defense work to charge less per hour than they charge other clients. Insurance companies are sophisticated consumers of legal service who extract fee concessions and who can go elsewhere if no concessions are forthcoming; they are good clients who pay their bills, provide steady work, and have somewhat standardized problems.[131] Indeed, the ethics rules explicitly provide that law firms, in setting the fee, may take into account the "nature and length of the professional relationship with the client" in setting the fee.[132]

Thus, the government should act like other sophisticated users of legal fees and bargain for lower rates when appropriate. Normally, market mechanisms determine the best fee to pay: One should not seek to pay too little by hiring mere apprentices when one should be hiring masters.[133] The point is not that cut-rate fees will encourage a lawyer to provide shoddy work; instead, the point is that if a lawyer is engaged in routine bill collection, he or she may not be competent to handle a complex bank reorganization, no matter what the client pays. In addition, if a competent lawyer can be found to engage in routine bill collection for seventy-five dollars per hour, it makes no sense for the government to pay one hundred dollars per hour.

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[127] As Prof. Milton Friedman has commented on an analogous argument of the medical profession:

> [When] people explicitly comment on the desirability of limiting numbers to raise incomes they will always justify the policy on the grounds that if "too" many people are let in, this will lower their incomes so that they will be driven to resort to unethical practices in order to earn a "proper" income. The only way, they argue, in which ethical practices can be maintained is by keeping people at a standard of income which is adequate to the merits and needs of the medical profession. I must confess that this has always seemed to me objectionable on both ethical and factual grounds. It is extraordinary that leaders of medicine should proclaim publicly that they and their colleagues must be paid to be ethical. And if it were so, I doubt that the price would have any limit. There seems little correlation between poverty and honesty. One would rather expect the opposite; dishonesty may not always pay but surely it sometimes does.

M. FRIEDMAN, CAPITALISM AND FREEDOM 152 (1962).

[128] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[129] *See* MODEL CODE EC 2-18 ("It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.").

[130] *See* MODEL CODE EC 2-16 ("[R]easonable fees should be charged in appropriate cases to clients able to pay them . . . . [P]ersons unable to pay all *or a portion of* a reasonable fee should be able to obtain necessary legal services . . . .") (emphasis added).

[131] *Cf.* G. HAZARD, *supra* note 96, at 104, 132 (1978).

[132] MODEL CODE DR 2-106(B)(6); MODEL RULES Rule 1.5(a)(6).

The market does not always work well when the government hires private attorneys because "it is very difficult to determine precisely what a government agency is responsible for achieving (it has no counterpart of a profit and loss statement), and therefore what are gains and losses. This in turn makes it difficult to say for a government agency what are efficient means of maximizing gains and minimizing loss."[134] Most government legal services are handled by its civil service. Thus, Professor Geoffrey Hazard concludes that "except when it employs special counsel, the government is never victimized by excessive fee rates."[135]

One need not be so pessimistic. A typical case where the government hires outside counsel occurs when a bank or savings and loan fails. The FDIC must take care of the problem, act as a receiver, and reorganize the bank. The FDIC uses local counsel for such short-term problems. These counsel are already on the scene and familiar with local law.[136] This procedure may make more economic sense than training and putting on the payroll a great many lawyers as permanent federal employees. It should not be difficult for the FDIC to determine what banking lawyers in the particular locality charge for that kind of work, and then try to seek some sort of concession from that base rate. In fact, that is what the FDIC does, and it should be emphasized that there is no ethical restriction to such "unseemly" bargaining. "If the subject brings to mind a counting house rather than chambers, it is nevertheless a necessary and therefore legitimate aspect of the practice of law."[137] The government's efforts at cost minimization are quite similar to corporate efforts to contain cost. The danger is not so much that the government will pay too little for legal services but that it will pay too much, and hire outside counsel who performs no unique service that could not be performed in-house with equal or better quality and at a substantially reduced fee.[138]

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[133] G. HAZARD, *supra* note 96, at 105 (1978).

[134] *Id.*

[135] *Id.*

[136] *Public Hearing*, *supra* note 8, at 96-99 (statement of Margaret Maguire, formerly Deputy to Chairman of F.D.I.C.).

[137] G. HAZARD, *supra* note 96, at 100-01 (1978).

[138] *See, e.g.*, *"Califano Fees, Roles Draw Fire,"* NAT. L.J., June 23, 1986, at 2, col. 1 (over last

Large corporations are not shy about seeking fee concessions; they try to contain their legal costs by using in-house counsel for legal work which is most suitable for them, e.g., constantly recurring problems where the repetitive nature of the work takes advantage of the learning curve of the inside corporate legal staff.[139] Outside counsel are used only when it is more cost efficient to hire them.[140] If the government would establish economic criteria to emulate private corporations it would violate no ethical restraints and produce a more efficient allocation of resources.

IV. Client Control Over the Lawyer's Independent Judgment

The client is not the ward of the lawyer. The client is instead the principal and the lawyer the agent.[141] The lawyer, however, has a certain domain of professional independent judgment within which the client has no control. The lawyer nevertheless must abide by the "client's decisions concerning the objectives of representation . . . ."[142] The *Model Code* and *Model Rules*

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six years Califano collected $2.8 million in fees from U.S. Postal Service). *See also "Fees for Califano Firm Top $600,000 in 1986,"* Fed. Times, Feb. 2, 1987, at 15, col. 1 (during first 11 months of 1986, U.S. Postal Service paid $600,000 to Califano's law firm); Wolf, Block, Schorr and Solis-Cohen, Use of Private Counsel by Federal Government Agencies, Report to the Administrative Conference of the United States, 46 (Sept. 1986):

> As far as the survey research could determine, Mr. Califano's services apparently involve no areas of special expertise, such as patent work, and do not involve complex litigation. Mr. Califano's services do not appear to have been a kind that could not be provided by the Postal Service's lawyers. The rentention of Mr. Califano thus deviated from use of private counsel by other agencies.

[139] Ryan, *Costly Counsel: Regulations and Fees Boost Legal Expenses; Firms Try to Cut Them,* Wall St. J., April 13, 1978, at 1, col. 1.

[140] The average hourly costs of in-house counsel is about half that of outside counsel. Ryan, *supra* note 139, at 33. At one major bank, inside legal costs were less than $100 per hour, while the bank's outside legal bills were much higher, up to $250 per hour. Stewart, *Legal Landmark: Major Banks Loosen Links to Law Firms, Use In-House Counsel,* Wall St. J., April 26, 1984, at 1, col. 6. Some law firms are reluctant to raise rates "because clients would probably respond by taking more legal work in-house." *Bus. Bull.*, Wall St. J., April 5, 1984, at 1, col. 5.

[141] Prate v. Freedman, 583 F.2d 42, 48 (2d Cir. 1978); Brinkley v. Farmers Elevator Mutual Ins. Co., 485 F.2d 1283 (10th Cir. 1973); State v. Barley, 240 N.C. 253, 254, 81 S.E.2d 772, 773 (1954).

[142] Model Rules Rule 1.2 provides:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

therefore attempt to lay out basic guidelines to distinguish between those matters where the lawyer must secure client waiver and those where the lawyer is in control and prior consent is unnecessary.

In general, the lawyer is entitled to make his or her own decisions in matters "not affecting the merits of the cause or substantially prejudicing the rights of the clients"; in other cases "the authority to make decisions is exclusively that of the client . . . ."[143] As the *Model Rules* candidly admit, however, sometimes a "clear distinction . . . cannot be drawn.[144] Examples help make the test more concrete. Thus, the client decides whether or not to accept a settlement offer or to plead guilty.[145] In criminal cases, the client has the final say as to whether or not to testify on his or her own behalf.[146] The lawyer has the duty to advise the client of the possible effect of each legal alternative.[147]

> (c) A lawyer may limit the objectives of the representation if the client consents after consultation.
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the laywer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

[143] MODEL CODE EC 7-7 provides:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Accord MODEL RULES Rule 1.2(a).

[144] MODEL RULES Rule 1.2 comment 1.

[145] MODEL CODE EC 7-7; MODEL RULES Rule 1.2(a).

[146] MODEL RULES Rule 1.2(a); *ABA Standards Relating to the Administration of Criminal Justice*, ch. 4: The Defense Function, standard 4-5.2(a)(iii) (1979) ("Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are . . . whether to testify on his or her own behalf.").

[147] MODEL CODE EC 7-8 provides:

> A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In

At other times lawyers have rights with which the client may not interfere. Lawyers have a right to agree to "reasonable requests of opposing counsel which do not prejudice the rights of his client . . . ,"[148] such as reasonable requests regarding continuances and waiver of procedural formalities.[149] A client, to make the adversary's life more uncomfortable, cannot require the lawyer to refuse to agree to a reasonable continuance. Lawyers also cannot require their clients to waive the right to decide whether to accept a settlement.[150]

It has been suggested that the lawyer for the government may not have the same independence of judgment as a privately retained lawyer.[151] It is certainly true that the government, a sophisticated client, may well decide to

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> assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego [sic] legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

One court has stated likewise:

> An attorney may refuse to call a witness even though his client desires that the witness testify; may abandon a defense he deems to be unmeritorious, may stipulate that the trial judge could view the premises, that a witness, if called, would give substantially the same testimony as a prior witness, and that the testimony of a witness in a prior trial be used in a later action; and he may waive the late filing of a complaint. On the other hand, an attorney may not, by virtue of his general authority over the conduct of the action, stipulate that his client's premises constituted an unsafe place to work where such a stipulation would dispose of the client's sole interest in the premises, nor may he stipulate to a matter which would eliminate an essential defense. He may not agree to the entry of a default judgment against his client, may not compromise his client's claim, or stipulate that only nominal damages may be awarded, and he cannot agree to an increase in the amount of the judgment against his client. Likewise an attorney is without authority to waive findings so that no appeal can be prosecuted, or agree that a judgment may be made payable in gold coin rather than in legal tender. An attorney also is forbidden without authorization to stipulate that the opposing party's failure to comply with a statute would not be pleaded as a defense . . . .

Linsk v. Linsk, 70 Cal. 2d 272, 278-79, 449 P.2d 760, 763, 74 Cal. Rptr. 544, 547 (1969) (citations omitted).

[148] MODEL CODE DR 7-101(A)(1). *See also* MODEL CODE EC 7-10 ("The lawyer's duty to zealously represent his client does not "militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.").

[149] MODEL CODE EC 7-38 ("A lawyer should . . . accede to reasonable requests regarding court proceedings, settings, continuances, waiver of formalities, and similar matters which do not prejudice the rights of his clients . . . .").

[150] MODEL CODE EC 7-7; MODEL RULES Rule 1.2(a). *See generally* Hayes v. Eagle-Pitcher Indus., 513 F.2d 892 (10th Cir. 1975) (arrangement allowing majority of clients in group to govern rights of minority violates attorney-client relationship).

[151] *Public Hearing, supra* note 8, at 65 (testimony of Prof. T. Morgan).

defer less to the lawyer's judgment, but there is no logical or policy reason why the ethical rules regarding the lawyer's independence should vary depending on whether the lawyer's client is the government or a private party. Larger business corporations are also sophisticated consumers of legal service and they also may grant less *carte blanche* authority to counsel, yet the ethical requirements governing a lawyer's independent professional judgment do not vary when the lawyer is outside counsel for a corporation or is in-house legal counsel.[152] The crucial test is not the status of the client—be it the government or a nongovernmental entity—but rather the sophistication and mental condition of the client. The lawyer should expect less direction from an illiterate, incompetent person than from an experienced, sophisticated client.[153]

A client who is sophisticated and financially able simply has more ability to restrict the lawyer in the area where the client has the ability to exercise ultimate control. In contrast, an appointed counsel has more freedom to disregard a client's wishes than a retained counsel, simply because the client who has a lawyer appointed has no place else to go. *Jones v. Barnes*[154] illustrates this point. In that case, a defendant objected on constitutional grounds to the fact that his appointed counsel did not raise every nonfrivolous issue on appeal as requested by the defendant. The defendant filed a pro se brief after his appointed counsel refused to raise on appeal all of the nonfrivolous issues requested by the defendant.

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[152] *See* Davis, *Corporate Law Departments—A New Look at the "New Look,"* 18 BUS. LAW. 569, 570 (Jan. 1963) ("[A] lawyer is a lawyer whether he charges fees or receives a salary. A salary corrupts no more than does a fee.").

[153] MODEL CODE EC 7-11 provides:

> The responsibilities of a lawyer may vary according to the intelligence experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer and appearances before administrative and legislative bodies.

In People v. Deere, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985), a defendant was convicted of first degree murder. The defendant told his lawyer that he knew "that he does not deserve mercy" and that he did not want to lose "the last vestige of dignity he has" by calling as character witnesses members of his family to testify that defendant should not be given the death penalty. *Id.* at 361, 710 P.2d at 929, 222 Cal. Rptr. at 18. The California Supreme Court held that the defense attorney was mistaken in his belief that he has "no right whatsoever to infringe upon his [client's] decisions about his own life." *Id.* at 364, 710 P.2d at 933, 222 Cal. Rptr. at 20. The court held that "[w]hile counsel should of course endeavor to comply with his client's wishes to the maximum extent consistent with his legal and ethical responsibilities, he is not . . . a mere 'mouthpiece.' " *Id.*

By contrast, in People v. Frierson, 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985), another death penalty case dealing with the allocation of decisionmaking authority between the defendant and his attorney, the defendant wanted to testify that he was under the influence of alcohol and drugs when he committed the crime. The attorney insisted that that contention only be presented at the penalty phase of the trial. *Id.* at 809-12, 705 P.2d at 399-401, 218 Cal. Rptr. at 76-78. The court recognized that most matters of tactics are for counsel to decide, but adopting counsel's strategy here guaranteed that the defendant would face at least a life sentence without possibility of parole. *Id.* at 814-15, 39 705 P.2d at 403, 218 Cal. Rptr. at 79-80. "Given the magnitude of the consequences that flowed from the decision," the court held the defendant had to have the right to choose. *Id.* Thus it ordered a retrial on the issue of special circumstances and penalty. *Id.* at 818, 705 P.2d at 406, 218 Cal. Rptr. at 82.

The client in *Frierson* was quite capable of making the reasonable decision he did, so the lawyer should defer to it. The client in *Deere* had no right to embrace the death penalty; it is for society to make that decision.

Chief Justice Burger, for the majority, rejected defendant's constitutional claim that the appointed counsel must raise every nonfrivolous issue requested by the client.[155] However, the Court—both the majority and the dissent—acknowledged that a client who had the ability to hire his or her own counsel could make clear, at an appropriate time such as the beginning of the relationship, that the lawyer must raise a particular nonfrivolous issue or issues.[156] The paying client could not specify that the attorney raise frivolous issues, because lawyers have a duty not to raise them. The paying client could insist, however, that the lawyer raise nonfrivolous issues, and if the lawyer objected, the paying client could hire another lawyer to take the case and force the first lawyer to withdraw from further representation.[157]

There is a basic core level of lawyer independence. As explained above,

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[154] 463 U.S. 753 (1983).

[155] *Id.* at 751-52.

[156] *Id.* at 753 n.6 (referring to the AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Chapter 21, *Criminal Appeals*, "which appear to indicate that counsel should accede to a client's insistence on pressing a particular contention on appeal.") (Burger, C.J., for the Court). Burger said, however, "that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution." 463 U.S. at 753 n.6.

See also id. at 758 n.2 ("[W]ith regard to issues involving the allocation of authority between lawyer and client, courts may well take account of paying clients' ability to specify at the outset of their relationship with their attorneys what degree of control they wish to exercise, and to avoid attorneys unwilling to accept client directions.") (Brennan, J., joined by Marshall, J., dissenting); *id.* at 754 ("[I]t seems to me that the lawyer, after giving his client his best opinion as to the course most likely to succeed, should acquiesce in the client's choice of which nonfrivolous claims to pursue.") (Blackmun, J., concurring).

[157] MODEL CODE DR 2-110(C)(1)(e) provides:

> [A] lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because his client . . . insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

See MODEL RULES Rule 1.16(b)(3) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.").

The client—no matter how much he or she pays—cannot force the lawyer to raise a frivolous issue. MODEL CODE DR 2-109 (A)(2) provides:

> A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to . . . present a claim or defense in litigation that is not warranted

the client, whether the government or private party, has no right to insist that the lawyer refuse to accede to a reasonable request by opposing counsel regarding a continuance.[158] Beyond that core level, there is a broad zone where the client and the lawyer have freedom to contract to limit the objectives of representation.[159] We should expect that more sophisticated and powerful clients, such as the government and some corporations and individuals, will have more of an interest in limiting, and power to contract to control, the lawyer's discretion concerning the objectives and means of representation. And then there is a core level where the lawyer has no right to limit the client's discretion—no matter how weak the bargaining power of the client—such as the client's decision whether or not to accept a settlement.[160]

The government lawyer, then, has no more or less independence of judgment than other attorneys working for private clients who are sophisticated, interested, and powerful consumers of legal services.

V. THE DUTY OF ZEALOUS REPRESENTATION

All attorneys must represent their clients competently.[161] The title to canon 7 of the *Model Code* also requires the lawyer to represent the client "zealously."[162] The *Model Rules* do not use that precise term because "zeal"

> under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

MODEL CODE DR 7-102(A)(2) provides: [A] lawyer shall not . . . knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. MODEL RULES Rule 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[158] MODEL CODE EC 7-38; MODEL RULES Rule 1.2 comment 1 ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues . . . .").

[159] MODEL RULES Rule 1.2(a),(c).

[160] MODEL CODE EC 7-7; MODEL RULES Rule 1.2(a). *See, e.g.*, *In re* Montrey, 511 S.W.2d 805 (Mo. 1974) (counsel suspended indefinitely for settling case for unauthorized amount); *In re* Stern, 81 N.J. 297, 406 A.2d 970 (1979) (counsel disbarred for secretly accepting settlement offer against client's wishes).

[161] MODEL CODE DR 6-101(A)(1); MODEL RULES Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[162] MODEL CODE Canon 7 ("A lawyer should represent his client zealously within the bounds of the law."). *See also* MODEL CODE EC 7-1 ("The duty of a lawyer, both to his clients and to the legal system, is to represent his client zealously . . . .").

can easily be interpreted to mean "overzeal,"[163] but the *Model Rules* do require the lawyer to act "with reasonable diligence and promptness in representing a client."[164]

The government lawyer—because he or she is a government lawyer—has the duty to mitigate this zeal in certain circumstances. It is sometimes said that the sovereign wins whenever justice is done. The duty of the government lawyer is not merely to win; it is to do justice. As the Supreme Court explained in *Berger v. United States*:[165]

> The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[166]

However, the ethics rules place special limits on the zealousness of government attorneys in only one class of cases, criminal cases. Thus, the prosecutor may not institute charges when he or she "knows" that they are not supported by probable cause,[167] and he or she must make "timely disclosure" to defense counsel of evidence that "tends to negate the guilt of the accused, mitigate the degree of the offense, on reduce the punishment."[168] The *Model Rules* seek to codify present law by adding several other requirements that apply only to government prosecutors.[169]

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[163] *Cf.* MODEL RULES Rule 1.3 ("A lawyer should act . . . with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client."); *In re* Blatt, 65 N.J. 539, 543, 324 A.2d 15, 17 (1974) (substituting altered evidence and warning witnesses not to cooperate with authorities "transgressed" boundaries of ethical conduct).

[164] MODEL RULES Rule 1.3. *See id.* comment 1 ("[A] lawyer should act . . . with zeal in advocacy upon the client's behalf.").

[165] 295 U.S. 78 (1935).

[166] *Id.* at 88.

[167] MODEL CODE DR 7-103(A) ("A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."); MODEL RULES Rule 3.8(a) ("The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

[168] MODEL CODE DR 7-103(B) provides:

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

The differences between the rock bottom constitutional requirement and the higher ethical standards should not be minimized,[170] because it is important to realize that the ethics rules tend to be broader than the constitutional rules. Thus, the constitutional rule typically requires the defense counsel to make a specific request for disclosure,[171] while the ethics rule is not so limited.[172] The point is simply that those ethical restrictions which are unique to government attorneys and which serve to limit zeal are only those which relate to prosecutors. Other ethics rules which limit zeal apply to all counsel, whether government counsel, or private attorneys.[173]

It is the unusual case where the federal government hires private counsel to prosecute a criminal case; however, the situation can exist. The most obvious example in modern times would be the situation where the Attorney

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Model Rules Rule 3.8(d) provides:

> The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

169. *See* Model Rules Rule 3.8(c) (prohibits prosecutor from seeking to obtain nonknowing waivers of important rights from accused). *Accord* Spano v. New York, 360 U.S. 315 (1959) (conviction reversed where assistant prosecutor and law enforcement officers persistently questioned accused leading to involuntary confession).

170. *Compare* Brady v. Maryland, 373 U.S. 83 (1963) (court found due process violation where prosecutor suppressed material evidence favorable to accused despite request for evidence from opposing counsel) *with* United States v. Agurs, 427 U.S. 97 (1976) (court held no constitutional error based on prosecutorial misconduct where defense counsel did not request prosecutor to turn over possibly material evidence; prosecutor has no constitutional duty to volunteer exculpatory matter).

171. *Id.* at 97. The constitutional requirement comes into play only when the violation causes the defendant specific harm, i.e., not "harmless error." *See, e.g.*, United States v. Lovasco, 431 U.S. 783 (1977) (investigative delay does not deprive defendant of due process despite some prejudice to his defense). The ethical violation nonetheless exists; *cf.* United States v. Doss, 563 F.2d 265 (6th Cir. 1977) (grand jury's interrogation of secretly indicted defendant regarding subject of indictment results in prosecutorial abuse).

172. Model Code DR 7-103(B); Model Rules Rule 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

173. Certainly, there are other requirements that limit prosecutors—such as the duty not to obstruct the other counsel's access to witnesses. United States v. Hyatt, 565 F.2d 229 (2d Cir. 1977) (prosecutor's termination of defendant's discussion with informant was improper but not prejudicial enough to warrant reversal). However, these requirements equally apply to nongovernment lawyers representing private clients. Model Code DR 7-109(B) ("A lawyer shall not advise or cause a person to secret himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein."); Model Rules Rule 3.4(a) ("A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.").

General appoints a Special Prosecutor.[174] When this situation occurs, there is no policy reason why the limitations on the zeal of a criminal prosecutor should be any less than when the prosecutor is a private attorney hired for purposes of a particular case or a particular investigation. Whenever the government retains a Special Prosecutor to conduct a criminal investigation, the duty is to seek conviction, *if* justice so requires.[175] The temporary, privately retained prosecutor should be under the same ethical obligations as the permanent prosecutor.

The *Model Rules* contains one special ethical aspiration, EC 7-14, which applies to government lawyers generally and not just to prosecutors:

> A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.[176]

The *Model Rules* provide no explicit counterpart to EC 7-14 and its admonition to avoid "unfair litigation." Both the *Model Code* and *Model Rules,* however, already have other sections not limited to government attorneys and that require *all* lawyers to refuse to bring an action or assert a position for the purpose of harassing another.[177] While EC 7-14 warns the lawyer, as an ethical aspiration, not to "use his position or the economic power of the government to harass parties, or to bring about unjust results," the *Model Rules* warn *all* lawyers that they have "a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure."[178] Similarly, *all* lawyers should point out to their clients those factors

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[174] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 694 n.8 (1974) (Attorney General's statutory authority vests independent Special Prosecutor with power to control course of investigation). There may also be the unusual case where the court rules a particular prosecutor is disqualified because of conflicts of interest. *See* People v. Superior Court, 19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977) (district attorney disqualified because victim's mother employed in prosecutor's office in charge of prosecution; mother material witness who would gain custody of grandchild if defendant convicted). The prosecutor's zeal should "be born of objective and impartial consideration of each individual case." *Id.* at 267, 561 P.2d at 1172, 137 Cal. Rptr. at 484. *Cf.* Vuitton et Fils, S.A. v. Klaymine, 780 F.2d 179 (2d Cir. 1986) (judge appointed counsel in civil case as special prosecutor to prosecute contempt charge against opposing counsel), *cert. granted*, 107 S. Ct. 266 (1986); General Motors Corp. v. United States, 573 F.2d 936 (6th Cir. 1978) (I.R.S. attorney disqualified from criminal case).

[175] *E.g.*, United States v. Kelly, 543 F. Supp. 1303 (D. Mass. 1982) ("The United States attorney's duty is not to *win* cases brought by him. Instead, his duty is to prosecute those cases diligently and fairly, with the firm purpose of seeing to it that justice is done in the courtroom.") (emphasis in original). For a contrary view, consider the remarks of a prosecutor quoted in Frankel, *The Adversary Judge*, 53 TEX. L. REV. 465, 471 (1976) ("You must never forget that your [the prosecutor's] goal is total annihilation.") (quoting M. Nadjari, Selection of the Jury (Voir Dire), text of lecture for National College of District Attorneys, University of Houston, (Summer 1971). *Cf.* McDonald v. Musick, 425 F.2d 373, 375-76 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970) (violation of DR 7-103(A) and DR 7-105(A) when prosecutor added charges after criminal defendant refused to stipulate police had probable cause for his arrest); Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 42, 620 P.2d 628, 170 Cal. Rptr. 42 (1980) (limiting *Musick* to cases involving "improper motivations" and "coercive tactics").

[176] MODEL CODE EC 7-14.

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[177] MODEL CODE DR 2-109(A) provides:

> A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to (1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person. (2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

MODEL CODE DR 7-102(A)(1), (2) provide:

> In his representation of a client, a lawyer shall not: (1) file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another; (2) knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

MODEL RULES Rule 3.1 & comment 2 provide:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
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> . . . .
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> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

MODEL RULES Rule 4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden or third person, or use methods of obtaining evidence that violate the legal rights of such a person."). *Cf.* MODEL CODE DR 7-106(C)(2) (A lawyer shall not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.").

[178] MODEL RULES Rule 3.1 comment 1, *supra* note 149. *Cf.* Zimmerman v. Schweiker, 575 F. Supp. 1436, 1440 (E.D.N.Y. 1983) (if attorney for private client should advise client not to defend claim, then government lawyers should do likewise).

Similarly, MODEL CODE EC 7-14 urges the government attorney to advise his superiors when he believes that a government claim lacks merit. All lawyers, however, already have the obligation to avoid prosecuting frivolous claims. MODEL CODE DR 2-109(A); DR 7-102(A)(1); DR 7-102(A)(2). This responsibility cannot be avoided by a lawyer refusing to advise his superiors. At-

"which may lead to a decision that is morally just as well as legally permissible."[179]

Nonetheless, one can find dictum in some cases that suggests government lawyers in a civil context do have a higher duty than a private attorney to avoid legal forum shopping.[180] It is difficult to understand why legitimate forum shopping rises to the level of an ethical issue, but some judges apparently are quite concerned about it. In any event, if a government lawyer should not engage in legitimate forum shopping—and the cases do not so hold—then the same rule should apply to private attorneys retained by the government *if* the policy reasons behind the principle are equally applicable. Because judges when announcing their dictum do not explain the policy reasons behind legitimate forum shopping, it is unclear whether private attorneys retained by the government should be under the same restrictions a few judges would seek to impose. Even if such restrictions would apply, they would apply only under the *Model Code*, because the *Model Rules* do not retain EC 7-14.

VI. IMPLICATIONS OF IMPROPER INFLUENCE

The *Model Code* explicitly provides that a lawyer "may not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official."[181] The *Model Rules* have a similar prohibition.[182]

On one level, there is no reason to discuss this requirement. It is an obvi-

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torney Grievance Comm'n v. Kahn, 290 Md. 654, 431 A.2d 1336 (Ct. App. 1981). *See also* MODEL RULES Rule 5.2(a) ("A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.").

[179] MODEL CODE EC 7-8, set out *supra* note 119. *See also* MODEL CODE EC 7-9 ("[W]hen an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action."). *Accord* MODEL RULES Rule 2.1 & comments 2, 3 ("[A] lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

[180] *See* May Dep't Stores Co. v. Williamson, 549 F.2d 1147, 1150 (8th Cir. 1977) (accusing government of forum shopping) ("It seems to me the Department of Justice has a greater responsibility to the courts and to the law.") (Lay, J., concurring); Caleshu v. United States, 570 F.2d 711, 715 (8th Cir. 1978) (criticizing government tactic to force taxpayer to litigate claim several thousand miles from home state) ("This type of legal harassment distroys the confidence of individual taxpayers in the fundamental fairness of the system.") (Ross, J., concurring).

[181] MODEL CODE DR 9-101(C) ("A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.").

[182] MODEL RULES Rule 8.4(e) ("It is professional misconduct for a lawyer to state or imply an ability to influence improperly a government agency or official."). This prohibition has a long history. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 184 (1938) (An announcement that includes "statements of the lawyer's experience in and acquaintance with the various departments and agencies of the government . . . is not only bad taste but ethically improper.").

ous one, and applies equally to private lawyers hired by the government. However, reference to it is significant only because many lawyers do not seem to be aware of or care about its existence. Indeed, some attorneys are particularly willing to work for a government agency, even at a reduced fee, because the relationship can be used to foster an appearance of favoritism with their private clients.[183]

The requirement that a lawyer not imply the ability to influence government action on improper grounds applies whether or not the lawyer actually exercises the influence and whether the lawyer could, in fact, exercise the influence. The rationale for this rule is that such implications by lawyers serve no valid purpose and undermine public confidence in the legal system even if the implication is false.[184]

Consider, for example, *In re Sears*,[185] where a lawyer wrote an official of a company that was his client. The lawyer implied that he had the ability to influence improperly a federal judge in connection in an investigation by the Securities and Exchange Commission involving the company and corrupt financier Robert Vesco. The court concluded: "In the instant case, the Vesco request was aimed at influencing the SEC suit and was highly improper. By fostering the impression that he had satisfied or could satisfy that request, respondent's conduct fell directly within the ambit of DR 9-101(C)."[186]

The prohibition against implying the ability to influence the government improperly may be so widely engaged in that agencies should make a special effort to inform the private lawyers whom they hire that the lawyers must be especially careful to avoid giving their clients an improper impression. For those lawyers who do not care to follow the law, more effective discipline is the only answer. But for the rest, education should help reduce the problem.

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[183] *See Public Hearing*, supra note 8, at 76 ("It's part of an attorney's marketing device.") (statement of Prof. S. Cohn).

[184] MODEL CODE EC 9-4 ("[A]ny statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it."); MODEL RULES Rule 8.4 comment 3 ("Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.").

[185] 71 N.J. 175, 364 A.2d 777 (1976).

[186] 71 N.J. at 191, 364 A.2d at 785. *Cf. In re* Brady, 64 N.J. 100, 312 A.2d 505 (1973) (attorney suspended for implying that attorney was able to influence improperly police officers); Ohio State Bar Ass'n v. Consoldane, 50 Ohio St. 2d 337, 364 N.E.2d 279 (1977) (attorney suspended for attempting to obtain funds from client for purpose of bribe to influence public official); *In re* Fasig, 444 N.E.2d 849 (1983) (attorney publicly reprimanded for suggesting criminal defendant's bond would be reduced on basis of attorney's friendship with judge). *Cf.* ABA Informal Op. 1448 (Dec. 18, 1979) (referring to former judge who appears at trial as counsel by title "judge" could be perceived as attempt to bolster position of litigant and work unfair advantage).

VII. CONCLUSION

Just as large corporations with in-house counsel may decide that the location of, and special expertise involved in, a particular legal problem may suggest the need to hire outside counsel, so also in various circumstances it may make good economic sense for the government to hire private attorneys. Such agency hiring usually does not raise special problems of legal ethics. That is, in most instances, the private attorney will follow the same ethics rules he or she must follow if the client were a private entity. However, in a few instances—e.g., if the private attorney is hired to aid in a criminal prosecution—the private attorney will be under the special ethical restrictions of a government attorney, for there is no policy reason to place the private attorney under any lesser restriction. The private attorney will also be under the restrictions of the various federal conflicts of interest statutes, for the government cannot relieve itself of the requirements of these statutes merely by hiring a private attorney. These statutory conflicts of interest rules do not apply in any unusual way to the private lawyers retained by the government. In addition, some types of ethics rules, for example the rules prohibiting attorneys from implying an ability to influence agency action on improper grounds, apply in the ordinary way, but some private lawyers retained by the government may not fully appreciate their application and significance.

In all these cases, it would be worthwhile for each federal agency, or some central government source, such as the U.S. Department of Justice, to issue ethics guidelines to the attorneys hired by the government. These ethics guidelines could focus attention on the relevant ethical and statutory proscriptions and serve to sensitize private attorneys to the already existing requirements. A special agency effort to inform attorneys of the ethics rules will have no effect on those attorneys who would recklessly disregard them. More effective discipline and disqualification from further federal employment may be the only effective remedies. However, an effort to make lawyers aware of the problem should be adequate preventive medicine for most lawyers.

For the special problem of conflicts of interest, more particularly, problems of simultaneous representation of conflicting interests in unrelated cases, the policy reasons and precedent all point in the direction of an agency-specific disqualification. That is, while an attorney is handling a matter for the Veterans Administration, neither the lawyer nor his or her firm should simultaneously be able to represent private clients who have claims against the Veterans Administration. In addition, if the Veterans Administration, in our hypothetical, hires the private attorney sufficiently often, then the Veterans Administration will probably be regarded as the "client" of that attorney. In this situation, neither that attorney nor his or her firm may take any cases adverse to the Veterans Administration even if, on a particular day, the attorney has no outstanding matter to perform for the Veterans Administration. This rule serves important policy justifications, as discussed above. It is not unduly onerous (in fact, it is the rule private attorneys have followed for years) *as long as* the disqualification is agency specific. A broader disqualification would burden both the government and private attorneys without compensating benefits to the public.

The private attorney should also be able to represent multiple clients simultaneously if their interests are not adverse. If the interests are only slightly adverse and neither client is directly opposed to another (e.g., neither matter involves litigation, or arbitration, or negotiation on opposite sides of the issue, or rulemaking), then both clients should normally be able to consent to the lawyer's representation of multiple clients.

There is always the danger that some state disciplinary jurisdictions or courts will be unduly mechanical in applying the simultaneous representation rule. To prevent such a possibility the federal government could always preempt[187] conflicting state rules. An individual agency or the U. S. Department of Justice, if authorized by Congress, could promulgate federal regulations making clear that the "client" for purposes of the simultaneous representation rule is the particular federal agency (and related agencies sharing a special community of interests) instead of the entire federal government.

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[187] Sperry v. Florida, 373 U.S. 379 (1963). *Cf.* Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1965), *cert. denied*, 385 U.S. 987 (1966).

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-4

FEDERAL USER FEES

by

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User fees are prices a governmental agency charges for a service or product whose distribution it controls. Recently, the federal government has developed substantial interest in financing through user fees a variety of the services it provides.[1] This article explores the propriety of that effort by identifying economic and legal theories that underlie user fees, investigating the means through which implementation of a fee program may advance or frustrate the objectives of user fees, and reaching certain conclusions about standards for the imposition of fees.

Typical discussions about which goods and services government should provide ignore questions concerning methods of payment. The decision to involve government in a particular venture instead centers on factors such as the "rights" or "entitlements" of citizens, or investigations into the "proper function" of government.[2] Isolating the question of service from the question of payment, however, necessarily and unfortunately overlooks important relationships between the two. Both the amount of service provided and the identity of particular recipients will largely be determined by the answer to the question, "Who pays?"

The need to consolidate the questions of provision and payment has become more stark as state and federal governments have increasingly moved from tax-based financing of particular goods and services to user fee-based financing.[3] From 1977 to 1983, such user fee revenues grew 11.4 percent annually, a growth rate two percent higher than that which prevailed during the preceding twenty year period.[4] By 1984, user charges provided about 20 percent of all state and local revenues. This growth reflects both less generous federal aid to states and localities and public resistance to increased taxes.[5] An increasingly substantial body of economic, legal, and financial management research on local user fees has facilitated increased reliance on user fees,[6] resulting in the emergence of a workable consensus on where and how local governments should employ fees.[7]

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[1] The motivation for this interest appears to be a desire to reduce substantial federal deficits without resorting to revenue-enhancing mechanisms that can be characterized as tax increases. *See, e.g.*, Shribman & Young, *Parks Chief Warns of Fund Cutback Impact*, N.Y. Times, June 17, 1986, at A21, col. 4.

[2] *See, e.g.*, Michelman, *Foreword: Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (discussing claims of the poor to "minimum protection" against economic hazards in terms of "just wants," the concept that people are entitled to have the government fulfill certain existing needs).

[3] *See* R. ARONSON & J. HILLEY, FINANCING STATE AND LOCAL GOVERNMENT 6-7 (4th ed. 1986) (asserting that local user charges have been the fastest growing component of local government revenues since the late 1970's); W. HIRSCH, THE ECONOMICS OF STATE AND LOCAL GOVERNMENT 29-48 (1970) (noting the vital importance of user charges in financing state and local governments); Mushkin & Bird, *Public Prices: An Overview*, in PUBLIC PRICES FOR PUBLIC PRODUCTS 3 (S. Mushkin ed. 1972) ("Continued revenue pressure on urban finances has led many cities to consider carefully the prospect of augmenting their financial resources by introducing or increasing fees and charges for various local government activities."). *Cf.* McCarney, *Increasing Reliance on User Fees and Charges*, in PROPOSITION 2½: ITS IMPACT ON MASSACHUSETTS 351-55 (L. Susskind ed. 1983) (noting that, although Massachusetts's cities and towns have historically relied on user fees less than the national average, reliance has increased in recent years).

[4] R. ARONSON & J. HILLEY, *supra* note 3, at 156.

While user fees at the federal level are by no means new,[8] they have never accounted for a substantial share of total federal revenues.[9] Prospects for expanding federal user fees, however, have attracted much attention during the Reagan Administration. The Grace Commission,[10] the Congressional

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[5] *See* McCarney, *supra* note 3, at 351-55 (discussing Massachusetts's increasing reliance on user fees and charges).

[6] A useful bibliography may be found in L. DEMERITT, USER CHARGES AND FEES IN LOCAL GOVERNMENT (1985).

[7] *See, e.g.*, G. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES 22-27 (1967) (discussing fiscal problems of federalism); J. MIKESELL, FISCAL ADMINISTRATION: ANALYSIS AND APPLICATIONS FOR THE PUBLIC SECTOR (1982); Berglas, *User Charges, Local Public Services, and Taxation of Land Rents*, 37 PUB. FIN. 178 (1982) (noting that recent literature recommends more extensive use of user charges by local government); Mercer & Morgan, *The Relative Efficiency and Revenue Potential of Local User Charges: The California Case*, 36 NAT'L TAX J. 203 (1983) (noting a potential revenue gain of about 20% in the area of user charges).

[8] Some such fees—postal services, for example--have been collected for as long as there has been a national government.

[9] Definitional and accounting complexities make it difficult to provide a clear picture of the revenue importance of user fees, but the following table provides some sense of their role.

REVENUE SOURCES, 1984

	Percent	
	Federal	*State and local*
Taxes	54	46
Insurance trusts	30	11
User fees	9	20
Intergovernmental	—	15
Other	7	8
Total	100	100

Derived from 1987 STATISTICAL ABSTRACT OF THE UNITED STATES 252.

[10] In 1982, President Reagan appointed the President's Private Sector Survey on Cost Control to investigate mechanisms to reduce costs and increase efficiency in government expenditures. J. Peter Grace served as Chairman of the Executive Committee, and the Survey has become known popularly as the Grace Commission. A User Charges Task Force recommended the expanded use of fees for governmentally provided goods and services and modification of existing statutes to overcome perceived ambiguity in the legal authority to impose fees. *See* PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL, REPORT ON USER CHARGES 234-42 (Spring-Fall 1983) (summary list of revenue and recommendations) [hereinafter REPORT ON USER CHARGES].

Budget Office,[11] the General Accounting Office,[12] and several Executive branch agencies[13] have issued reports exploring various aspects of federal user fees. The Office of Management and Budget's most recent report on impending regulatory initiatives outlines numerous proposals for new or increased user fees that President Reagan has recommended to the Congress.[14] A number of federal agencies that already have statutory authority for user fees have been moving toward implementation of higher fees covering more services.[15]

The active interest in federal user fees is easily understandable. Continuing large federal budget deficits have created a fertile climate for user fees as a supplement to general taxation.[16] Less public attention, however, has been directed to the behavioral and distributional effects that can be expected from the shift to fee-based financing of governmental services. Those who previously obtained free services for which they will now have to pay will presumably demand fewer services. Ultimate recipients may constitute a very different group from those who previously sought the services.

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[11] *See, e.g.*, CONGRESSIONAL BUDGET OFFICE, FEDERAL POLICIES FOR INFRASTRUCTURE MANAGEMENT (June 1986); CONGRESSIONAL BUDGET OFFICE, CHARGING FOR FEDERAL SERVICES (Dec. 1983).

[12] *See, e.g.*, GENERAL ACCOUNTING OFFICE, PARKS AND RECREATION: RECREATION FEE AUTHORIZATIONS, PROHIBITIONS, AND LIMITATIONS (May 1986) [hereinafter PARKS AND RECREATION]; GENERAL ACCOUNTING OFFICE, THE CONGRESS SHOULD CONSIDER EXPLORING OPPORTUNITIES TO EXPAND AND IMPROVE THE APPLICATION OF USER CHARGES BY FEDERAL AGENCIES (March 1980).

[13] *See, e.g.*, OFFICE OF MANAGEMENT AND OPERATIONS & OFFICE OF PLANNING AND EVALUATION, FOOD AND DRUG ADMINISTRATION, USER CHARGE STUDY (August 1983) [hereinafter USER CHARGE STUDY]; R. TRUMBLE & S. GOULD, USER FEES FOR UNITED STATES GOVERNMENT TECHNICAL SERVICES (March 1983) (report for National Science Foundation).

[14] *See* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT 25-26 (1987) (grazing fees); *id.* at 27-28 (collection of costs for Forest Service in the Bureau of Land Management); *id.* at 431 (U.S. Customs Service merchandise processing user fee); *id.* at 482 (user charges for pesticide registration).

[15] *See, e.g.*, Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 52 Fed. Reg. 10,226 (1987) (to be codified at 47 C.F.R. §§ 0, 1, 21, 23, 61, 66, 73, 76, 78, 80, 90, 94, 95) (order by Federal Communications Commission to implement procedural changes in fee collection); Fees Applicable to Producer Matters, Natural Gas Pipeline Matters, Etc., 52 Fed. Reg. 10,366 (1987) (to be codified at 18 C.F.R. § 381) (updating Federal Energy Regulatory Commission's filing fees).

[16] The difference between a fee and a tax is typically rooted in the relationship between the exaction and the cost of the service for which the exaction is imposed. Fees may escape the rubric of taxes where they do not exceed the reasonable cost of providing the underlying service. *See, e.g.*, Mills v. County of Trinity, 108 Cal. App. 3d 656, 166 Cal. Rptr. 674 (Cal. Ct. App. 1980) (permitting imposition of "fee" without compliance with state constitutional limit on taxes).

This article examines the effects of a user fee system on the provision of governmental goods and services.[17] In Section I of the article, we draw from economic theory to suggest an ideal model of user fees. We suggest that user fees are best understood as a mechanism for matching the burdens of governmental services with their benefits, structured so as to enhance the efficient provision of governmental services. Where consumption of services confers substantial benefits on nonpayers, it may be desirable to charge fees that recover less than full costs in order to avoid disincentives for individuals or firms to engage in socially useful conduct. We also consider alternative objectives for user fees. Primary among these objectives are considerations of fairness that not only require a matching of benefits and burdens, but also require occasionally providing governmental services without corresponding fees to ensure access to benefits whose distribution should not depend on economic status. In addition, user fees may serve the objectives of enhancing federal revenues and encouraging privatization of government functions.

In Section II, we explore the legal status of federal user fees. Our analysis of the primary statutory basis for federal user fees, the Independent Offices Appropriation Act ("IOAA"),[18] suggests that ambiguity pervades current standards governing user fees. We argue, however, that the existing case law can and should be reconciled with the economic principles presented in Section I of the article. We explain, therefore, how legal requirements of "identifiable beneficiaries" and "identifiable benefits" correspond to the objectives that would be served by an ideal user fee. We also investigate the correspondence, or lack thereof, between those objectives and recently enacted user fee statutes that are not explicitly predicated on benefits received.

In Section III we consider how technical details of user fee implementation may affect the propriety of a user fee program. We analyze the procedural constraints on agencies to impose fees in a manner that does not interfere with overriding policy objectives. We also analyze conflicting interpretations of "benefit" to determine, for instance, whether the term can be employed to recover costs incident to regulation or the imposition of licensing requirements on a private company. We conclude that any efforts to implement a fee program must also take account of the ultimate disposition of fees—that is, whether they should be retained by the agency imposing them or paid into the general treasury—as well as political considerations that might induce agencies to deviate from an optimal fee program.

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[17] This article primarily focuses on fees charged for goods or services that are provided by government to identifiable private recipients, whose access can be rationed by a price mechanism. Some additional limitations on the scope of this article also seem warranted to keep it manageable. In particular, this article excludes: military functions and transactions with foreign governments; one-time sales of government assets that do not represent an ongoing government function; excise taxes that are not linked to the provision of goods or services to the taxpayer; intragovernmental fees; penalties and fines; fees related to government loans; and insurance programs.

[18] 31 U.S.C. § 9701 (1983).

The article concludes with a series of recommendations for the creation of standards concerning user fees and their implementation, and the creation of a clearinghouse for information concerning fees.

I. USER FEE POLICY OBJECTIVES AND PRINCIPLES

A. *A Definition of User Fees and a Standard for Evaluation*

A user fee is a price charged by a governmental agency for a service or product whose distribution it controls. A user fee is, at least in theory, a benefit-based source of revenue whose logic is simple. Payment of a user fee reflects receipt of a valued service in return, a quid pro quo. By contrast, federal income taxation is generally not benefit-based; rather, it imposes burdens that reflect complex Congressional judgments about, among other things, a taxpayer's ability to pay.[19]

Our primary emphasis in this article is on the extent to which user fees foster a more efficient allocation of goods and services. In our use of an efficiency criterion, we adopt the standard definition of allocating resources to their most highly valued use, generally as indicated by the recipient's willingness to pay for the resource.[20] Our selection of an efficiency criterion emerges from our assumption that the principal reason that the government provides the underlying services is to compensate for the failure of the private market to achieve some reasonable approximation of optimal resource allocation. These market failures may be attributable to the existence of public goods, substantial externalities, information or immobility problems, or natural monopolies. Once government determines that one of these effects renders intervention appropriate, however, there is little reason to deviate from the pricing mechanisms that the private market, had it worked, would have used to achieve an allocation of the good—marginal cost pricing, for example—on the assumption that this mechanism sends signals concerning the socially appropriate amount of the good or service that should be produced.

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[19] Numerous providers of governmental services have begun to argue that beneficiaries of those services should bear the financial burden of their provision. Consider this example drawn from the telecommunications context:

> To the extent that fees do not cover the true costs of reimbursable services, differences must be made up through the appropriation of general tax receipts. Because many taxpayers do not directly or indirectly benefit from each and every service rendered by the Commission we fail to see why they should be required to pay for those regulatory activities that principally benefit private interests. Failure to recover all reimbursable costs is tantamount to forcing taxpayers to subsidize those firms and their customers . . . . Such subsidies may not be legal, necessary, equitable, economically efficient or in the public interest.

Practice and Procedure: Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Reconciliation Act of 1985, 51 Fed. Reg. 25,794 (1986) (to be codified at 47 C.F.R. §§ 0, 1, 21, 22, 23, 62, 73, 74) (proposed July 16, 1986) [hereinafter Fee Collection Program].

[20] For a similar definition of efficient allocation, see M. BRENNAN, THEORY OF ECONOMIC STATICS 6 (2d ed. 1970).

This "allocation function"[21] does not, of course, exhaust the scope of governmental activity. Government also serves redistributional functions, such as welfare payments, and stabilization functions, such as Federal Reserve policies. To implement these functions, government often imposes charges of one form or another. Exactions may be imposed on the wealthy and redistributed to the poor, federal discount rates may be increased or decreased to affect the rate of economic growth, surcharges may be imposed on certain goods (e.g., sumptuary taxes on liquor or tobacco) considered by a paternalistic government to be "bad" for the consumer. Each of these charges represents government's attempt to modify behavior in the consumption of goods and services. What distinguishes user fees from these other charges is the nature of the intended behavioral modification. Rather than to induce individuals to spend more or less money generally (stabilization) or paternalistically to reduce consumption of "sinful" commodities or to ensure the ability of the economically disadvantaged to consume a specific level of other commodities (moral and distributional functions), the decision to reject or employ a user fee is best viewed as based on a desire to induce a socially optimal amount of the underlying good or service.

At times, these functions may conflict so that satisfaction of one requires subordination of another. For instance, given that redistributional programs seek to separate, or to draw inverse correlations between, the ability to pay and allocation of personal assets, those goods and services that government redistributes appear inappropriate subjects for user fees. In fact, we will suggest that, even with respect to those goods properly subject to a fee, considerations of fairness may vitiate application of the fee or warrant waivers and differential fees. Keeping this exception in mind, however, it becomes useful to review briefly the bases of market failure that user fees may be used to address.

1. Public Goods

Goods and services characterized as "public" may be undersupplied because individuals are unwilling to express their true preferences for them in the marketplace. Public goods exhibit two key features: their consumption is not rival, and nonpayers cannot easily be excluded from their benefits.[22]

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[21] For a general discussion of government's allocation function, see R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 7-11 (3d ed. 1980).

[22] M. TAYLOR, ANARCHY AND COOPERATION 14-15 (1976); *see* R. MUSGRAVE & P. MUSGRAVE, *supra* note 21, at 55-58 (discussing social goods and market failure);

Consumption is not rival if a unit of a good or service, once produced, can benefit a second person without any loss of benefit to the initial consumer or extra cost to anyone. For instance, if resident *A* values street lighting on his block enough to pay the full cost of the service, resident *B* will obtain equal benefit of the lighting, notwithstanding *B*'s failure to contribute anything towards the cost of the service. Where both features substantially appear, as in national defense or mosquito control, unconstrained markets will underproduce the goods because people acting out of self-interest face strong incentives not to reveal their desire for these goods.[23] If resident *B* believes that resident *A* values street lighting sufficiently to incur the total cost, *B* will understate his or her own preference for the service to resist claims for contribution. *A*, however, may follow the same strategy, hoping that *B* will incur the total cost. Consequently, the service will be undersupplied as each potential beneficiary of the service awaits action by others. The conventional solution to this situation, in which no one pays for what everyone wants, is to permit governmental supply of the service, financed through exactions from all benefited residents, i.e., taxes or assessments.[24]

A user fee has limited appeal in this particular situation. Any person in the area served automatically has access to the benefits whether or not he pays

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Head, *Public Goods and Public Policy*, 17 PUB. FIN. 197 (1962) (examining theory of public goods). For purposes of our analysis, it is sufficient that goods and services display these characteristics of a public good. Of course, goods and services may be subject to limited exclusions, and thus share some characteristics of private goods, or different consumers of goods and services may receive different amounts or types of benefit. Even in cases of mixed goods, however, there may be tendencies in favor of public supply. *See* W. RIKER AND P. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY 246-67 (1973) (arguing that self-interested actors may undersupply goods if personal benefits would be exceeded by personal costs, notwithstanding that social benefits would exceed personal costs).

[23] For an analysis of variations of this problem, see Taylor & Ward, *Chickens, Whales, and Lumpy Goods: Alternative Models of Public-Goods Provision*, 30 POL. STUD. 350, 352 (1982). Implicit in this statement is the notion that goods may have "public" characteristics without being "pure" public goods. For instance, congested public goods, like highways or national parks, may exist in which use is nonrival up to a point, although additional users may reduce the enjoyment of other users. *See* M. TAYLOR, *supra* note 22, at 15.

[24] For some nonpublic goods, governmental intervention may be required because start-up costs of the project are substantial and not easily recaptured. *See* F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 35-36 (1970) (suggesting that private industry would not invest in pubic projects such as bridges, dams, and roads, because it could not recover start-up costs without inducing sub-optimal usage); Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 719 (1986) (arguing that a governmental body might be a useful manager where many persons desire access to or control over a given property but are too numerous or whose stakes are too small to express preferences in market transactions).

any fee, so collection based on revealed preference for the service would not be very practicable. A mandatory charge, of course, could be levied regardless of service usage, but that would be a tax, not a user fee. Moreover, since public goods are nonrival in consumption, no additional costs are incurred by making the benefit available to another person located within the service area. Thus, charging a fee for service would seem anomalous because marginal cost, the basis for pricing, would be zero.[25]

Many services contain only one but not both features of a public good. Such services can be nonrival in consumption, but they nevertheless can be rationed by price. Examples of services from which consumers can be excluded by a price mechanism include an uncongested bridge or theatre. A user fee or access fee certainly can be applied to such services, but the troublesome result would be the denial to nonpayers of benefits that are costless. Yet at some point facilities must be replaced, and user fees provide a plausible mechanism for creating a sinking fund that would ultimately finance replacements.

2. Externalities

A marketplace transaction between two people may affect the well-being of a third person in a way that is not reflected in the price of the good or service that is the subject of the transaction. The effects can be either favorable or detrimental to that third person, but in any event the affected person has no direct influence on the transaction. Familiar examples are education (on the favorable side) and pollution (on the detrimental).[26] In these situations, prices emerging from the private market transaction will not reflect its true costs and benefits because the parties are unlikely to consider external effects in calculating the personal value of the transaction. The government often intervenes on behalf of affected third persons, in lieu of their direct participation in the market transaction.[27] The government can assume an allocative role, adopting actions that will encourage increased availability of those goods or services yielding external benefits and reduced availability of those imposing external costs. The more pervasive these external effects, the larger the government's role becomes.

Government intervention in these situations may take a variety of forms. Government may intervene intrusively to regulate behavior and enforce its regulations through a series of fines and penalties. Alternatively, government may assign property rights to persons adversely affected by the transaction and provide a mechanism of adjudication, but leave the decision to use that mechanism in the hands of individual owners of the property rights. Finally, government may induce certain socially desirable behavior by providing the underlying goods or services, or limiting access to them, and then charging users a fee that incorporates the external costs and benefits of provision. Our objective here is not to determine when any one of these means of intervention is desirable,[28] but to investigate the implications and desirability of the user fee selection generally.

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[25] R. MUSGRAVE & P. MUSGRAVE, *supra* note 21, at 56.

[26] Assume *A* can produce beer for $1 per bottle, but *A* also produces 10¢ of pollution per bottle. If *A* does not have to pay the cost of the pollution to *C*, *A* can charge *B* $1 for the beer. Nevertheless, the pollution injures *C*.

[27] For an argument that government is not necessary to induce consideration of externalities, see M. TAYLOR, *supra* note 22.

Not all indirect effects of a governmental service, however, should be considered as externalities. In some situations, the relationship between those directly and indirectly affected may be such that the former are induced to take the consequences for the latter into their own decision. For instance, when the direct recipient of a governmental service is a business firm, there may be indirect benefits to the firm's customers. A user fee then can be collected from the firm to cover both benefits to the firm and to its customers. The fee will not fully deter the firm from seeking the service, because the firm will not ultimately bear all the costs of the service. Of course, in deciding how much of the fee to pass along to customers, the firm will take account of how the fee will affect the demand of those customers for the firm's products. The point is simply that, when all benefits accrue to a firm and its customers as distinct from other persons, no externality exists.

3. Information and Immobility Problems

Markets cannot operate smoothly if participants lack basic information about the costs and benefits to them of alternative actions.[29] Government can intervene to provide or require others to disseminate such information (for example, auto fuel economy, appliance energy efficiency). Similarly, the government can take on the role of facilitating mobility or job shifting. Information itself is a public good, but its distribution has many characteristics of a normal private good. Later in this article we discuss a number of user fee issues that arise in this connection.[30]

4. Natural Monopoly

In some businesses, producers experience continuously decreasing unit costs as they expand production. The result, absent government involvement, would be domination by the single largest producer, who could underprice all competitors. If the surviving firm then could protect itself from the subsequent entry of potential competitors, it would be able to increase its prices to levels well in excess of production costs. Protecting consumers from such outcomes has formed the rationale for much government activity, such as pipeline regulation, and has figured in the formation or continuation of government enterprises (for example, public power).

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[28] For an attempt to make such an investigation, see Shavell, *Liability for Harm Versus Regulation for Safety*, 13 J. LEGAL STUD. 357 (1984).

[29] S. BREYER, REGULATION AND ITS REFORM 26 (1982).

[30] *See* SECTION III, *infra*.

B. *User Fees and Economic Efficiency*

Efficient pricing exists if one is deterred from consuming additional units of public service only when the benefits of that consumption are less than its costs to society.[31] As the above discussion suggests, there are many situations in which a user fee can successfully ration limited supplies of currently available goods and services to more highly valued uses, signal whether particular output levels should increase or decrease, avert wasteful usage, and encourage use of more suitable substitutes. In this sense, a user fee is essentially a mechanism available to link the service with the potential consumer of a scarce resource. It is an alternative to first-come, first-served, to lotteries, and to administrative judgment. The central task is to determine those circumstances in which a user fee will be the most satisfactory choice of rationing mechanisms. To make this determination, we begin with the simplifying assumption that those who would pay user fees are motivated by self-interest, rather than by either envy or altruism. An envious payer would be willing to sacrifice some personal benefits to keep noncontributors from receiving it.[32] Envy, therefore, exacerbates the problem of underutilization that we suggest might otherwise accompany the imposition of user fees.[33] Altruistic payers, however, would have the contrary effect. An altruist might be willing to pay for somewhat more of a service than was justified by a comparison of personal costs and benefits precisely because others would also benefit from that action.[34]

If there are no significant externalities associated with a particular service that warrants public provision, then user fees constitute an efficient rationing mechanism. If the government is producing goods that could be provided at least as well by the market, user fees certainly are appropriate.[35] In both these situations, a user fee can be relatively successful in encouraging the most productive use of the service, barring possible accounting and managerial complexities.[36]

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[31] Goetz, *The Revenue Potential of User-Related Charges in State and Local Governments*, in BROAD-BASED TAXES: NEW OPTIONS AND SOURCES 118 (R. Musgrave ed. 1973).

[32] *See* J. RAWLS, A THEORY OF JUSTICE 530-34 (1971) (discussing the problem of envy in the theory of justice); Leff, *Injury, Ignorance and Spite: The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 18-19 (1970) (discussing the importance of spite in transaction costs).

[33] *See* SECTION III, *infra*.

[34] Here we follow Howard Margolis, who defines "altruistic behavior" as a situation in which "the actor could have done better for himself had he chosen to ignore the effect of his choice on others." H. MARGOLIS, SELFISHNESS ALTRUISM & RATIONALITY: A THEORY OF SOCIAL CHOICE 15 (1982); *see* F. FROHOCK, RATIONAL ASSOCIATION 21 (1987) (arguing that, in the Prisoner's Dilemma, "egoists play to a suboptimal outcome, altruists play to an optimal equity outcome.").

[35] In some such cases, efficient provision might be equally or better served by privatization of the function currently performed by government. *See* Cass, *Privati-*

With the user fee, the potential beneficiary of a government service is the one who must pay the opportunity cost of the service—that is, the additional cost that society will incur in providing an increment of service. There are two important results if the beneficiary freely decides how much, if any, of the service to utilize. First, the consumer for whom the service holds little value automatically will be deterred from its use. Second, persuasive willingness-to-pay evidence will be yielded indicating whether the government should increase or decrease its provision of the service. The former is conducive to maximizing society's material well-being over the short-term; the latter facilitates the same result over the long run.

For a user fee to have these desirable consequences, setting the amount of the fee is quite important. As a general matter, "the costs that should be recovered are the opportunity costs sacrificed at any time."[37] Application of this principle, however, may require attention to varying factors, depending on the specific situation. Consider four possible scenarios:

1. The government can increase or decrease its output of a particular service that is not available elsewhere. The inputs used have known market values, and per unit costs do not decline as more is produced (for example, inspection services). In this situation, marginal cost pricing keyed to full recovery of incremental production costs will be efficient. The opportunity cost will be the personnel and support costs incurred by government in providing the service.

2. A particular service can be characterized exactly as in Example 1 except that it also can be obtained from private firms through market transactions (for example, certain postal delivery services). Assuming continued governmental provision is warranted—a privatization issue—an efficient user fee may properly exceed incremental agency production costs, and instead reflect the service's market value. This conclusion, however, requires some judgment about whether private suppliers are pricing and producing efficiently and whether the government enjoys artificial cost advantages, such as tax exemption.

3. The government is allocating a good or service—grazing rights, for example—that entails little if any current costs of production, the service has scarcity value in that not all who want the service can be accommodated, and more of the service cannot be produced. In this situation, the opportunity cost associated with providing an increment of service to an additional

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zation: Forms, Limits, and Relation to a Positive Theory of Government, 71 MARQ. L. REV. __ (1987) (forthcoming).

[36] *See* SECTION III, *infra*.

[37] Milliman, *Beneficiary Charges—Toward a Unified Theory*, in PUBLIC PRICES FOR PUBLIC PRODUCTS 37 (S. Mushkin ed. 1972).

beneficiary is the value forgone by shifting the service away from the next most interested potential consumer. Where identified—through auction, bidding, or private markets for comparable services—this value should serve as the amount of the user fee if efficiency is to be achieved. This user fee may exceed actual out-of-pocket costs incurred by the government.

4. Considerable past (one-time) cost has been incurred relative to the level of ongoing production costs (for example, dam construction). Sunk costs or historical costs as a general rule should not be factored into user fees; that is, historical cost recovery and efficient user fees are not always compatible objectives. This is an example of a natural monopoly that poses a well-known efficiency dilemma between short-run allocation and long-run replacement decisions.[38] To the extent that user fee revenues fall short of recouping the total costs borne by the government, the gap must be filled with general tax revenues. Then, "[t]he efficiency questions should be concerned with the possible adverse effects of these taxes upon resource allocation versus the adverse effects of the levy of beneficiary charges that might return historical costs but still be inefficient."[39] Moreover, if replacement costs are likely to be encountered at some point, efficiency is not well-served by restricting user fees to the recovery of current production costs alone.[40]

We have thus far focused on situations in which consumption is voluntary. For some, the voluntary use of the good serves as an additional justification for a user fee.[41] Even if there is a degree of coercion in the decision to use the service, however, a user fee may have important efficiency advantages.[42] For example, assume a statute directs each member of a certain group to take a personal safety training course offered only by the federal government. As a general matter, the short-term allocative efficiency objective would not likely be particularly well-served by a user fee, still assuming no externalities. However, suppose further a statute accurately reflects plausibly paternalistic motives and unambiguously indicates both what groups should be directed to make use of the service and how much they should use. If the statute is based on solid benefit-cost reasoning, a user fee may be superior on efficiency grounds to other means of finance, because it will not burden those who neither use nor benefit from this service, and thus not influence their actions.[43] On the other hand, should the statute have little to commend it on benefit-cost grounds, it is still arguable that a user fee would have favorable longer-term efficiency consequences. The payer would be more inclined to insist on prudent service delivery and to press for closer scrutiny of the levels and terms of service continuation.

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[38] *See* H. Rosen, Public Finance 306-11 (1985).

[39] Milliman, *supra* note 37, at 39 (emphasis omitted).

[40] Indeed, it would be inappropriate to "tell beneficiaries and public agencies that costs are important before a project is built and then not require cost-recovery the day after." *Id.* at 46.

[41] *See, e.g.*, Goetz, *supra* note 31, at 113 ("Because [user-related charges] are linked to an individual's consumption of specific public services, their payment is in a sense voluntary and directly linked with a benefit.").

[42] While some contend that where usage is involuntary a user fee has little to commend it, *see, e.g.*, J. Mikesell, *supra* note 7; Mushkin & Bird, *supra* note 3, at 21 (using the example of a returnable bottles program), others advocate user fees even when usage is mandatory, *see, e.g.*, Kafoglis, *The Potential of Local Service Charges*, in Local Service Pricing Policies (P. Downing ed. 1977); Seldon, *Enhancement of Public Sector Efficiency*, in Public Finance and the Quest for Efficiency: Proceedings of the 38th Congress of the International Institute of Public Finance (H. Hanusch ed. 1984).

To summarize, in the absence of both externalities and mandated usage, user fees are likely to have attractive efficiency attributes in allocating access to the service in the short run as well as in guiding governmental decisions about levels and types of service to provide in the longer run. Moreover, regardless of whether usage is mandated, user fees probably will have desirable efficiency effects in financing service provision. Directly placing the production cost burden on the recipient of the service rather than on other taxpayers will likely limit the excess burden associated with all revenue sources.[44]

Once we relax the assumption that governmental services produce no externalities, the efficiency, and hence desirability, of user fees changes markedly. User fees may be associated with external effects in either of two ways. As our discussion of public goods reveals, where each recipient who pays for a governmental service simultaneously confers benefits on nonpayers, a user fee may induce underuse of the service from a societal perspective. Alternatively, where recipients of a governmental service are not otherwise required to incur the corresponding costs of the service, imposition of a user fee may forestall overuse.

Consider first the situation in which partaking of a governmental service by one party necessarily confers benefits on a third party who contributes nothing to the cost of the service, as in the case of spillover benefits or positive externalities. An apt example would be a municipality that offers and charges a fee for, but does not require, weekly garbage collection. Residents who do not accept the municipal service may either remove their own garbage or may contract with private collectors. Those persons unwilling to pay the user fee may find less frequent disposal more consistent with their own preferences. Nevertheless, the resulting accumulation of garbage may impose adverse effects on neighbors. More frequent collection, therefore, would confer a benefit on the neighbors, even though they bear none of the commensurate costs. The neighbors (who effectively wish to free ride by changing the collection practices of the infrequent disposer) play no role, however, in determining how much collection will be undertaken by the infrequent disposer. Similarly, the infrequent disposer has no incentive to factor third party benefits into his decision about making use of the service.[45] Consequently, an individual resident will ignore external benefits when deciding whether to use the service. Measured from a societal perspective, underuse of the service will likely result. Elimination or reduction of the user fee to reflect the external benefits might reduce the cost of frequent collection sufficiently to induce the infrequent disposer to take advantage of the governmental service. In other words, user fees that place full costs of service on only a subset of service beneficiaries have an efficiency drawback.[46] Figure 1 explains the situation graphically.[47]

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[43] Of course, one might question whether the statutory coercion would change any decisions by those user group members who are well-informed about the service's benefits to them.

[44] Excess burden refers to the distorted decisions that result when a tax changes private incentives inadvertently by shifting relative prices that guide behavior. To the extent that these distortions impose a loss of welfare on consumers greater than that resulting from the tax payments themselves, the tax generates an "excessive burden" on society at large. W. OATES, FISCAL FEDERALISM 121-22 (1972); *see* H. ROSEN, *supra* note 38, at 275 (suggesting that consumers, when faced with a tax or user charge on a particular product or service, might completely forgo the good or service, thereby producing no revenue).

P_c in Figure 1 indicates the marginal cost curve of more frequent garbage collection. MB_p indicates the infrequent garbage disposer's marginal benefit curve for more frequent garbage collection. This individual voluntarily will pay for Q_1 garbage collections per month, the quantity that corresponds to the intersection of MB_p and P_c if a full cost recovery user fee is charged. Marginal social benefits of garbage collection (indicated by the MB_s curve), however, reveal a social preference for the individual to purchase Q_2 units of garbage collection. In order to induce investments to this level without resorting to frequency regulations, society would have to lower the individual's user fee to P_p.[48] The net social benefit that results from reducing the user fee below the full cost recovery level is shown by triangle abc.

Unlike the garbage collection example, in which full cost recovery through user fees may induce underuse, there are other instances in which user fees can avoid overuse. For example, when the government supplies goods or

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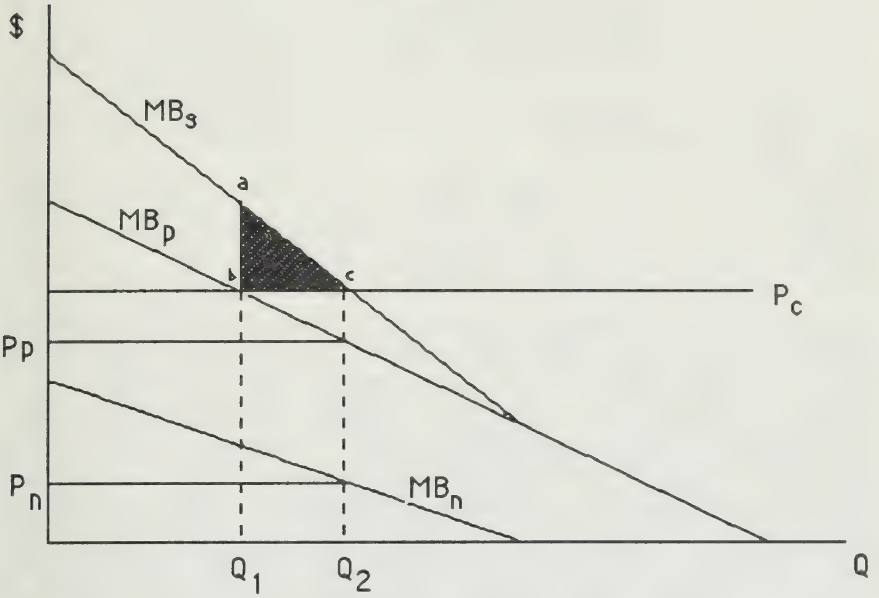
[45] Our assumption here (perhaps a heroic one) is that the infrequent disposer is motivated solely by the price of services when making choices. We recognize, however, that other factors, such as interactions with neighbors and issues of status, may also affect garbage disposal decisions.

[46] "When spillover benefits exist to a significant extent, the imposition of full marginal-cost user pricing will lead to a suboptimal level of the activity in question." Goetz, *supra* note 31, at 123.

[47] Adapted from Kafoglis, *Local Service Charges: Theory and Practice*, in STATE AND LOCAL TAX PROBLEMS 164, 170 (H. Johnson ed. 1969).

[48] Q_2 is optimal in the sense that it maximizes net social benefit. Net social benefit is the amount by which total social benefits (graphically the area under MB_s from the vertical axis to Q_2) exceed total social costs (the area under P_c from the vertical axis to Q_2).

FIGURE 1



Q is the frequency of garbage collections (per month);
P_c is the collection cost per house per pickup;
MB_p is the marginal private benefit (value to a household of more frequent pickups);
MB_n is the marginal external benefit (value to others in the neighborhood of picking up one family's garbage);
MB_s is the marginal social benefit (combined private and external benefits) of more frequent pickups from one family.

services at a charge less than the cost of supplying the service, the recipient necessarily receives a subsidy from others. An individual recipient who can reap the benefits of the service while imposing the corresponding costs on others has an incentive to overuse the governmental resources. One such situation of public "bads," perhaps best referred to as the tragedy of the commons,[49] is likely to arise where scarce property is held in common—public parkland or fishing areas, for example—so that each individual has a claim to use. As each individual exercises that claim, however, the resource may be overused from a societal perspective. Nevertheless, no individual has an incentive to moderate his or her personal use, notwithstanding that joint use generates a net social loss.[50] User fees may be particularly appropriate insofar as they discourage overuse by requiring users to bear some of the costs of maintaining the public property or to recognize the costs imposed on others through private use.[51] As a mechanism for pricing access to the commons, user fees provide an alternative to direct government rationing or grants by government to private parties of monopoly rights in the public property.

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[49] *See* Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (arguing that in a society that believes in the freedom of the commons, individuals will pursue only their personal interests, and disregard societal interests in relation to the commons). For a discussion of the limits of the concept, see Rose, *supra* note 24, at 779.

Quite apart from such commons effects, other types of adverse consequences, such as pollution, often are imposed on nonusers. Failure of the producer to recognize all the costs of its activity is likely to generate overinvestment in the activity. An additional user fee may play an important efficiency role in restraining this excess.[52] Indeed, charges in excess of marginal costs may be justified where the service is receiving some benefit from expenditures made through the general treasury. For instance, if a locality is providing waste treatment and charging a user fee for the service, it may be appropriate for the locality to charge a fee that exceeds the capital and operating costs of the facility and to return the "profit" to the local treasury. This result could be appropriate if the excess charge reflects the costs incurred by the locality in providing police and fire services to the facility, as those services generally will be financed through local taxation.[53]

The extent to which these positive and negative externalities complicate the case for user fees depends on a number of factors, the most important of which are price elasticities, the pervasiveness of the externality, and the feasibility of adjusting the level of the user fee to compensate for the externality. The effect of price elasticities may be seen most readily by considering the effects of sharply increasing user fees for services previously available at only nominal charge. If fee payers' decisions about the quantity of the service to use are insensitive to the fee level—that is, demand is price inelastic—there will be little change in service levels. Whatever net social benefit existed before the fee increase is likely to persist.

Put differently, a user fee has quite limited allocational effects when service demand is price inelastic. Of course, one may be concerned about the fairness of letting free riders ride free, to which we turn shortly,[54] but there is not much of an efficiency case against user fees when demand is inelastic.[55] The main efficiency issue then has to do with the relative sizes of excess burdens associated with alternative financing mechanisms. However, when demand is rather sensitive to the fee level, reliance on user fees warrants much more searching scrutiny from an efficiency perspective. The absence of user fees ordinarily will invite overuse of the service if not carefully rationed by other means, while excessive user fees will unduly cut service utilization. It is when service demand is elastic that a properly set user fee—one that reckons with externalities—should have the most favorable efficiency effects; some even argue that user fees are only desirable when demand is elastic.[56]

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[50] In short, governmental intervention may be necessary to devise a mechanism to allocate the resources "because no one has an incentive to economize in their use." H. ROSEN, *supra* note 38, at 126.

[51] In order to reduce overcongestion of the commons, an ideal fee would equal the difference between the social and the personal marginal cost of use.

[52] Much of the literature on Pigovian taxes applies well in this situation, calling for an extra surcharge on the normal user fee when external costs exist. *See generally* H. ROSEN, *supra* note 38, at 132-35; R. TRESCH, PUBLIC FINANCE: A NORMATIVE THEORY 93-131 (1981).

[53] *Cf.* Town of Terrell Hills v. City of San Antonio, 318 S.W.2d 85 (Tex. Civ. App. 1958) (holding that differential rates for residents and nonresidents were justified because the former paid taxes that financed fire services protecting the utility).

The pervasiveness of the externality also bears on the appeal of a user fee. Between the polar cases of pure public goods and pure private goods lies the great majority of intermediate cases.[57] In these situations, the larger the external benefits are relative to the benefits derived by fee payers, the more complex the efficiency case for user fees. While some would question the suitability of user fees when there are extensive externalities,[58] at least in principle an efficient fee structure can be designed. As Goetz explains,[59] the user fee should be reduced by a subsidy payment equal to the marginal value to society of the external benefit attributable to the feepayer's use of the service (P_n in Figure 1 above).

As this conclusion suggests, the compatibility of efficient user fees and externalities depends considerably on limitations of technology and economic accounting.[60] Here it may suffice to make two preliminary assertions:

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[54] *See infra* notes 63-73 and accompanying text.

[55] As one author has commented:

> [t]ake the usual argument that . . . recreational services should be priced below cost because this makes for a healthier and happier society to the joint benefit of everyone. This argument has merit only if it can be shown that the demand for the recreational services that are in question is in fact highly price elastic; otherwise low prices fail to fulfill their stated objective.

G. Break, Intergovernmental Fiscal Relations in the United States 221 (1967).

[56] *See, e.g.*, R. Wagner, Public Finance: Revenues and Expenditures in a Democratic Society (1983).

[57] *See supra* notes 22-25 and accompanying text.

[58] *See, e.g.*, Mikesell, *supra* note 7, at 272.

[59] Goetz, *supra* note 31, at 123 (pointing out that where extensive spillover benefits exist, the subsidy could be the marginal social value of those benefits).

[60] Goetz suggests that technological advances may improve the availability of efficiency-enhancing fees:

> Given the present technology of collecting highway tolls, the delays and other costs attendant on the collection process make it impractical to consider pricing city streets but perfectly feasible to levy charges on trunk highways. Nevertheless, it is not impossible to imagine the development of electronic monitoring

that an efficient user fee will not exceed the incremental opportunity cost of separately providing the service to a fee payer, and that a two-part tariff coupling such a user fee with a tax or other levy may be a way to enhance overall efficiency if either externalities exist or per unit service costs decline as usage rises.

Another issue in economic accounting—one unrelated to externalities—also requires some attention. It is often the case that in producing a service the government incurs some costs, so-called "common costs," that are not easily attributable to particular service users but that do have to be covered in some fashion. Most efforts to allocate common costs fully across service users are flawed from an efficiency perspective. Indeed, Baumol contends that, "[n]o form of cost allocation can pretend to be compatible, generally, with efficiency in resource allocation, no matter how sophisticated its derivation."[61]

A frequently recommended approach to this common cost problem is Ramsey pricing, also referred to as inverse elasticity pricing, which collects a disproportionate share of the unattributable cost from those recipients who make the smallest cuts in their use of the service when the fee rises. For example, airlines may charge higher air fares to business travelers than to discretionary travelers who would not travel at the higher fares. The aim is to cover overhead costs in a way that will induce the least possible change in user decisionmaking, and so impose the smallest excess burden on society.[62]

C. *Alternative Objectives for User Fees*

Presumptively, the government relies on user fees to compensate for market failures; nevertheless, criteria other than efficiency are legitimate and sometimes more important in the decision to institute or forgo user fees. This conclusion does not deny the effect user fees would have on encouraging optimal allocation of resources. It instead asserts that other objectives may conflict with and trump that goal. Prominent among these alternative objectives are fairness, revenue enhancement, and privatization.

> devices that would bring almost-universal road-usage pricing within the realm of practicality. Where the possibility of technological advance seems promising, a public policy of investment in the research and development of exclusionary devices that would facilitate the pricing of roads and other public services may bear very high returns.

Goetz, *supra* note 31, at 118.

[61] W. Baumol, Superfairness: Applications and Theory 146 (1986).

[62] Useful discussions of this aim may be found in *id.* at 143-48, 161-63; S. Breyer, *supra* note 29, at 53, 232, 289. *See generally* E. Zajac, Fairness or Efficiency: An Introduction to Public Utility Pricing (1978). How much of common costs an efficient user fee can finance remains a difficult implementation problem due largely to inadequate data about demand elasticities.

1. Fairness

While the definition of allocative efficiency is relatively unambiguous, concepts of fairness elude any precise, generally accepted definition.[63] Nevertheless, fair distribution appears to constitute a key normative criterion by which to judge any proposed governmental provision of goods and services. Debates about fair distribution often attempt to arbitrate among deontological or utilitarian theories. User fees, however, have particular implications for two conceptions of fairness. The first of these assumes that fair distributions create a correspondence between costs and benefits of governmental provision. Thus, pricing of any governmentally supplied good or service should be set to recover the costs of provision. The second, almost contrary conception is that fair distribution requires redistribution of existing allocations of wealth in order to ensure access to certain goods regardless of one's willingness or ability to pay. In either case, an appeal to fairness may override user fees that otherwise would engender efficient allocations of resources.

(a) *Pricing to recover costs*. The concept of fairness most commonly encountered in the user fee literature entails imposition of financial burdens commensurate with the conferral of benefits, so that full costs are recovered from service recipients.[64] While this may seem only a restatement of the efficiency criterion, it can lead to rather different policy recommendations. The distinction lies between pricing to recover costs—the fairness concern—and pricing to manage use—the efficiency concern.[65] Situations often arise in which efficient pricing would not recoup the government's total outlays on the program, and thus would require a subsidy from non-beneficiaries.[66]

Fair pricing attaches little weight to incentives for particular patterns of use or consumption. Instead, the fairness issue is whether, for any given program, a user fee is a suitable means to lessen burdens that otherwise would be borne by taxpayers who derive little or no benefit from the service. When direct beneficiaries of a government program pay no user fee, or one

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[63] *See* W. BAUMOL, *supra* note 61, at 7-14 (discussing generally the difficulties in deriving a workable definition of fairness).

[64] Thus, Rosen concludes, "fairness requires consumers of a publicly provided service to pay for it." H. ROSEN, *supra* note 38, at 309; *see* Milliman, *supra* note 37, at 29 (arguing that the stress on equity and efficiency gains of having taxpayers pay for benefits received is set within the context of fairness).

[65] It should be recalled, in other words, that efficiency basically focuses on how pricing influences allocative decision. "Efficient use results when the person deciding whether or not to use a given service values it at whatever it costs to provide the specific increment of service he or she seeks." CONGRESSIONAL BUDGET OFFICE, FEDERAL POLICIES FOR INFRASTRUCTURE MANAGEMENT 64-65 (June 1986).

[66] The Congressional Budget Office, for instance, suggests that this phenomenon results from the pricing of space shuttle services. CONGRESSIONAL BUDGET OFFICE, PRICING OPTIONS FOR THE SPACE SHUTTLE (March 1985).

that falls short of the cost of the service they receive, a burden is shifted onto other segments of society (including taxpayers as a whole). The result is a "cross-subsidy." Of course, the user fee also may be unfairly high, in which case the fee payer is subsidizing others.

Economists generally argue that, for a service to be provided free of subsidy, "the cost share of any group of customers in a common project should not exceed the 'stand alone cost' of serving only their needs."[67] The "fair" user fee thus covers at least the incremental opportunity costs—costs that the government can avoid simply by not making additional service available to an additional user—and at most it covers these opportunity costs plus any overhead costs—common costs—that are unaffected by such usage. This establishes a range of arguably "fair" user fees.

When there are substantial common costs that cannot be attributed easily to particular users, the range of "fair" fees likely will be rather wide. Among the approaches developed for selecting particular fee levels within that range of fairness is Ramsey pricing.[68] While one of the noteworthy features of this approach is that its use fosters greater efficiency, some question its fairness. The effect of Ramsey pricing may be to lump disproportionate costs on those most dependent on the service. For instance, charging a premium for public transportation at times of peak usage would impose those costs on wage earners.[69] Some commentators, therefore, have expressed a concern that the efficiency gains of Ramsey pricing may not always outweigh the distributional consequences.[70] On the other hand, a traditional and countervailing tax equity principle is "that those who benefit most should bear a relatively large share of the costs. This suggests that it can be considered 'fair' for customers whose demands are relatively inelastic to pay prices that are relatively high in comparison with the corresponding marginal costs, just as Ramsey pricing prescribes."[71] Numerous other approaches have been developed to allocate common costs, but none, including the more recent game theoretic allocation procedures, inexorably generates a uniquely compelling vision of equitable pricing or income distribution.[72]

User fees warrant particular attention when a cross-subsidy arises inadvertently from service provision. Unfortunately, the task of unambiguously identifying and measuring such a cross-subsidy is often quite difficult. Conceptually, any uncompensated externality forms a cross-subsidy. That service benefits accrue unintentionally to nonpaying third parties is largely a reflection of imperfectly established property rights. This may be due to inherent indivisibilities, entailing sizeable common costs, or it may be due to fee collection practices that make payment readily avoidable by some service recipients.

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[67] W. SHARKEY, THE THEORY OF NATURAL MONOPOLY 41 (1982).

[68] *See supra* note 62 and accompanying text.

[69] W. BAUMOL, *supra* note 61, at 182 ("If most travelers during [peak hours] are wage earners, and if their work hours are beyond their control, then the sufficient conditions for presumptive unfairness may, indeed, be satisfied.").

[70] *Id.* Baumol also suggests that pricing that permits distribution of goods and services at peak periods may adversely affect "group morale" or "the social fabric" by creating a sense of elitism in those who can afford the premium and jealousy by those who cannot. *Id.* at 181-82.

[71] *Id.* at 148.

[72] *Id.* at 182; *see* Cass, *Looking With One Eye Closed: The Twilight of Administrative Law*, 1986 DUKE L.J. 238, 240-44 (discussion of the problem of social good).

Ideally, a user fee can eliminate many cross-subsidies. As the fee rises from zero toward fully covering the incremental cost of the service, subsidies from the general taxpayer to the direct user of the service decline. If a portion of the benefits or costs of the service accrue to some from whom no fee can be collected (the indirect beneficiaries), how far is it fair to allow the user fee collected from payers (the primary recipients) to rise?

Our discussion of the efficiency criterion concluded that a full cost user fee could be warranted even if externalities are substantial, so long as the demand is relatively price inelastic. This result, however, is difficult to reconcile with any fairness perspective. Indeed, it seems more reasonable to argue that, regardless of demand elasticities, it is only fair to lower the user fee below full cost recovery whenever external benefits arise, and to raise it whenever external costs are created.

How far the user fee should fall when external benefits exist is not easy to determine either conceptually or empirically. The approach referred to earlier[73] as the stand-alone cost test provides a useful upper bound on user fees: unless the fee falls at least to the incremental long run cost of independently providing service to the feepayer, it will be both inefficiently and unfairly high. But if one equates the price of the user fee with benefits received, fees can be further reduced, so that each recipient contributes an amount per unit consumed that equals the personal marginal benefit derived.

Were it possible to measure the increment of satisfaction or material well-being received by nonpayers as a result of the service provision, it would appear equitable to levy a corresponding tax or other duty on these nonpayers. Such revenue then should be applied to help defray the government's costs of providing the service, allowing a further reduction in the user fee.

(b) *Pricing for redistribution*. There are, of course, other concepts of fairness that warrant attention. One is that the recipients of certain government services should pay fees that are keyed to the recipients' relative affluence, or that the disadvantaged or impoverished should receive user fee waivers or exemptions.[74] On this conception of fairness, pricing should not interfere with minimal levels of the relevant goods. For instance, governmental provision of day care services for the poor may easily satisfy the efficiency criteria for a user fee, insofar as the service is made available to discrete, excludable beneficiaries and the supply of services is limited, i.e., rival. If, however, the function of the service is to provide gains to the poor other than those related to efficiency—for example, an in-kind form of public assistance—subsidization of day care through the tax system will be appropriate.

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[73] *See supra* note 67 and accompanying text.

[74] *See* R. MUSGRAVE & P. MUSGRAVE, *supra* note 21, at 230-31 (noting that user fees properly can be attached to those who can best afford them).

Nevertheless, institution of a user fee system does not necessarily entail abandonment of the principle of vertical equity on which an ability-to-pay revenue system is based. Ordinarily, it should be quite possible to structure a user fee system in a way that satisfies concerns that a fee system is inherently regressive.[75] Waivers can be devised to favor whatever population segment "fairness" advocates identify. Even without waivers, a user fee system is fairer to the disadvantaged who make no use of the service than is tax financing.[76]

Federal programs also employ user fees to cross-subsidize particular groups, commodities, activities, regions, or types of businesses in the form of support, subsidy, relief or assistance. In such instances, a user fee is logically not expected to finance the full cost of the service. One special case involves so-called merit goods,[77] use of which the government decides should be increased or decreased despite a lack of user interest or willingness to pay, and despite an absence of obvious externalities.[78] Artificially low access fees for local telephone service are an example. One might also contend that some activities or services are so fundamental, and so embodied in constitutional principles, that they should be accessible to everyone regardless of willingness or ability to pay a fee.[79] For merit goods other than those with constitutional entitlement features, there may be no particular inequity created by choosing a user fee as the way to finance the change in service mandated by government. Of course, it may be quite unclear whether the recipient of the merit good, or society generally, is actually benefiting.

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[75] *See, e.g.*, Kafoglis, *supra* note 47, at 857 (arguing that regressive fee systems are the result of misapplied pricing principles, and that appropriate pricing practices would improve efficiency and distribution of goods while diminishing the level of "coercive" taxation).

[76] *See* K. McCarthy, Exploring Benefit-Based Finance for Local Government Services: Must User Charges Harm the Disadvantaged (1984); A. Pascal, EBBF: A Guide to Installing Equitable Beneficiary-Based Finance in Local Government (1984).

[77] For a brief discussion of the problems of merit goods, see R. Musgrave & P. Musgrave, *supra* note 21, at 83-86.

[78] *See id.* at 84-86; Musgrave, *Social Goods and Social Bads*, in O. Oldman & F. Schoettle, State and Local Taxes and Finance 830-31 (1974) (explaining the reasons for creating the concept of "merit goods"); *see also* H. Margolis, *supra* note 34, at 75 (acknowledging that the theory of merit goods accounts for people's actual preferences, but doubting the theory's usefulness in scientific analysis).

[79] We also note, however, that some see the merit good label simply as a cloak for a value judgment that a good or service should be provided collectively. *See, e.g.*, H. Rosen, *supra* note 38, at 65 (quoting Baumol & Baumol, Book Review, 89 J. of Pol. Econ. 425, 426-27 (1981)). Margolis is even more skeptical, and suggests that a "merit good, in effect, is any item of public expenditure that seems socially reasonable but cannot be accounted for within the ordinary economic theory of demand." H. Margolis, *supra* note 34, at 75.

The fairness of a user fee may seem obvious where the mandated service keeps the recipient from imposing external costs on society, such as pollution or a safety hazard; however, a fee's fairness is not so obvious in other cases, such as a mandatory fee for registration of bicycles. The fairness of charging a user fee may be questionable if individuals are required by law to use a service.

A closely related problem arises when the recipient of the service has little or no control over the quantity of the service and the user fee is the same regardless of the volume of service received. The allocational efficiency as well as fairness advantages of user fees are still present in such situations, but they are muted. Goetz's comments on an analogous situation are pertinent:

> The government, in essence, has decided that the benefits from a certain expenditure are divisible between those who are not being specially assessed and those who are being assessed, but are indivisible within the assessed group. This may not be an unreasonable rule of thumb. Unlike the other types of user charges, however, it is then not possible to be certain that the services provided are really worth the price in terms of the assessment extracted.[80]

Finally, fairness concerns may be triggered if the institution of user fees affects prior investments. The transition from a program without user fees to one heavily supported by user fees can cause substantial windfall gains and losses. Taxes and fees are often capitalized in asset values, and a change in the former results in a corresponding change in the latter.[81] Those owning assets affected by a new user fee will experience a loss. This is unavoidable and must be recognized in planning the timing and phasing when introducing new fees.

2. Revenue Enhancement

Perhaps the most transparent objective that user fees serve is that of pricing to raise revenues—cost recovery to lessen budgetary problems. Providing services is not costless, and there are serious constraints on each of the several mechanisms normally available to government to cover these costs.

It may be worth recalling just what these alternatives encompass. The first, of course, is taxation. Tax revenues, however, have not been sufficient to meet overall expenditure levels at the federal level, and there is strong aversion to any increases in tax rates. Recent tax reforms, combining rate reductions with loophole closing, have been defended as roughly revenue neutral at best; they certainly are not likely to close the federal budget deficit. A second alternative with potential cost-saving gains includes further managerial improvements and program pruning, but these fall well short of eliminating fiscal problems.[82] A third alternative is to devolve costly programs to lower levels of government, such as the decentralization components of the current Administration's federalism initiatives. This last alternative certainly has reduced pressures on the federal budget, but it is unclear how much further such decentralization can go. Another alternative that can provide some limited relief is asset and credit transactions—sale of federally owned property, and reversion to additional borrowing maneuvers of various types, but this entails potential costs of divesting resources for which the government is an essential steward. Finally, government might reduce costs of supplying certain public goods, such as disseminating information about products, by replacing its own involvement in the area with regulations that require the private sector to undertake the same task and bear the commensurate costs. Recent efforts at deregulation, however, suggest increased reluctance to mandate such costs.

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[80] Goetz, *supra* note 31, at 120.

[81] *See* Gillette, *Equality and Variety in Delivery of Municipal Services* (Book Review), 100 HARV. L. REV. 946, 959 n.37 (1987) (arguing that capitalization may interfere with efficient provision of local services).

Regardless of the progress the federal government achieves in economizing on its provision of basic services, it will continue to seek additional ways to finance those services. An increase in the level and scope of user fees constitutes a plausible answer to this financing problem. Moreover, those who want to expand the provision of any particular service may conclude that certain user fees offer an attractive opportunity to enlarge the budget for that service.

Under these circumstances, there may be instances in which a charge was termed a user fee even though it was quite similar to a tax. Unless a service is provided directly to a payer or indirectly to its customers, however, the revenue-producing measure is best evaluated and denominated as a tax, not a user fee.[83]

Even where exactions are linked to benefits, and hence properly designated as user fees, implementation and enforcement costs may have indirect effects on other revenues. Tax collection cost estimates show that about five cents of every dollar collected in federal income taxes is needed just to pay for tax administration and compliance activities.[84] Consideration of how costly a user fee is to administer relative to the gross receipts expected from the fee is essential to any user fee being considered on revenue grounds. Moreover, alternative revenue tools—such as an excise tax, or simply general taxation—should be compared to the user fee in this regard.

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[82] Kelman, *The Grace Commission: How Much Waste in Government?*, THE PUBLIC INTEREST, Winter 1985, at 62 (potential of waste-cutting to eliminate federal deficits greatly exaggerated).

[83] *See* Asson v. City of Burley, 105 Idaho 432, 440 n.17, 670 P.2d 839, 847 n.17 (1983) ("To the extent [a] surcharge imposes an obligation on the ratepayer unrelated to the quantity of electricity used, it could constitute a tax.").

A user fee also may have an indirect revenue effect worth considering. If a user fee can be treated as a deductible business expense, imposition of that fee will diminish income tax revenues while it increases other government receipts. The net effect is what counts for the overall budget. If there is earmarking, a user fee will have a larger effect on a particular program budget than on the overall budget.

When considering cost recovery and revenue enhancement objectives of user fees, one must consider the amount that should be recovered by a fee. For example, one aim could be to recover from service beneficiaries the actual out-of-pocket costs the government has incurred in making the service available. This amount could turn out to be either too high or too low to be compatible with the norm of economic efficiency.[85] Or the government could strive to set fees much as would a profit-maximizing private entrepreneur, with the net revenues serving to benefit the citizenry as a whole; but that might prove incompatible with norms of fairness to feepayers. This may point to a plausible minimal objective of relying on user fees only in those situations where receipts will be generated well in excess of fee compliance costs and only so long as these fee levels are neither markedly inefficient nor unfair.

3. Privatization

The domain of user fees consists of goods and services that share many similarities with those financed, produced, and distributed in decentralized fashion by private entrepreneurs. User fee services occupy a middle ground between the polar case of purely public goods and the large array of basically private goods. For various reasons relating to economic logic, historical accident, and political influence, the federal government furnishes numerous services to private beneficiaries who can be charged accordingly. As we have seen, it is possible to structure these user fees in ways that more or less successfully generate needed federal revenues, foster a more efficient economy, and enhance distributional equity.

Privatization is a separate normative factor that bears on user fees in two respects. First, only a limited array of federal services, such as national defense, are so unique and vital as to make private substitutes impracticable. For goods that the private sector could produce and distribute successfully, determining the wisdom of continued federal production may precede the question of user fee financing.[86] Numerous means and opportunities exist to transfer federal activities and assets to the private sector,[87] and user fees have little role to play once such privatization is accomplished.[88]

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[84] E. Browning & J. Browning, Public Finance and the Price System 311 (2d ed. 1983).

[85] *See supra* notes 64-73 and accompanying text.

For private goods or services whose production or consumption creates external costs or benefits, federal production (and user fees) may be a plausible option, but probably one much less warranted than private production coupled with limited federal intervention. Such intervention would take the form of fiscal tools, such as Pigovian[89] taxes or subsidies, regulatory tools, information strategies, or liability and property rights remedies, to correct market failures.

Second, the design of user fees can have significant implications for the development within the private sector of alternative sources and complementary services, where a continuing federal responsibility has been persuasively reaffirmed for the provision of a service. One aspect of this question is whether potential alternative suppliers should even be allowed to develop in the private sector. The main economic consideration here is whether the government's enterprise can produce the service more economically, but only if protected from competition, than can any other potential suppliers (i.e., whether the situation can be termed a "nonsustainable natural monopoly").[90] The Postal Service has made such an argument, for example, as did the former AT&T system, but most disagree.[91]

Another aspect of this question is how to structure user fees so that they do cover all opportunity costs of producing the service. This is in part a straightforward point about efficiency, discussed earlier. But it also has to do with the climate created for private entrepreneurship. If an innovator wants to offer a service that can substitute for all or a portion of a currently provided government service, the government should not discourage this through unduly low user fees. Indeed some contend that privatization can be fostered quite significantly by setting efficient user fees.[92]

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[86] For an attempt at such justifications, see Gillette, *Who Puts the Public in the Public Good? A Comment on Cass*, 71 MARQ. L. REV. __ (1987) (forthcoming) (suggesting, as an example, that governmental production could provide a centralized forum for consumer complaint and similar opportunities to exercise a "voice" option).

[87] For a sampling of the different methods of and opportunities for privatization, see S. BUTLER, PRIVATIZING FEDERAL SPENDING: A STRATEGY TO ELIMINATE THE DEFICIT (1985); Cass, *supra* note 35; Kolderie, *Two Different Concepts of Privatization*, 46 PUB. ADMIN. REV. 285 (1986).

[88] And recall that as a definitional matter, this article does not treat proceeds from the one-time sale of assets as a user fee unless as part of an ongoing federal function.

[89] Pigovian taxes would compensate creators of external benefits in order to induce their continued production. *See generally* A. PIGOU, THE ECONOMICS OF WELFARE (3d ed. 1929).

[90] *See* W. SHARKEY, *supra* note 67, at 86.

[91] This is the logic underlying the Postal Service's defense of the monopoly over delivery of first class letters accorded it by the Private Express Statutes. As to the telecommunications example, see S. BREYER, *supra* note 29, at 285-314 (concluding that natural monopoly was less a characteristic of long distance than of local service); G. BROCK, THE TELECOMMUNICATIONS INDUSTRY 303 (1981) ("The current roadblock to competitive conditions [in the telecommunications industry] is local distribution.").

Stated differently, privatization concerns are an extension of the efficiency reasoning with which this section began. If user fees are set too low, entailing cross-subsidies from other governmental activities, the government will be discouraging competition quite artificially. Setting fees at efficient levels would invite competition from private producers and thus permit discovery of whether a market failure really does exist.

II. User Fee Statutory and Case Law

In this section, we will review existing statutory and case law concerning federal user fees and critique current policies in light of the principles of public finance that underlie an ideal system of user fees. To the extent that existing law deviates from the ideal, we will suggest mechanisms by which the particular deviation may be eliminated. Our critique is predicated on a conception of user fees that emphasizes their capacity to induce optimal investment in specific activities. As we have noted above, this objective may occasionally be trumped by alternative, nonallocational objectives. Where those alternative objectives seem particularly appropriate, we will suggest how they might affect the purely allocative approach with which we begin.

A. *Constitutional Considerations*

1. Delegation of Authority to Levy Fees and Taxes

The federal government, and Congress in particular, appears to have unconstrained power to raise revenue through a system of user fees. Congress, however, does not possess the capacity to set individually the myriad fees for the vast array of services that the government provides. That function must, as a practical necessity, be performed by the provider of the service, typically an administrative agency within the executive branch.

The constitutional capacity of agencies to fulfill this function, however, has been challenged in a series of cases that implicitly suggest the existence of some constitutional limit on fee-setting by administrative agencies. In the companion cases of *National Cable Television Association v. United*

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[92] *E.g.*, Seldon, *Enhancement of Public Sector Efficiency by Micro-Economic Control of Public Supply*, in PUBLIC FINANCE AND THE QUEST FOR EFFICIENCY: PROCEEDINGS OF THE 38TH CONGRESS OF THE INTERNATIONAL INSTITUTE OF PUBLIC FINANCE 162 (H. Hanusch ed. 1984).

States,[93] and *Federal Power Commission v. New England Power Co.*,[94] the Supreme Court provided the initial interpretations of the Independent Offices Appropriation Act ("IOAA"),[95] the primary statutory basis for the imposition of user fees. While the opinions in those cases were primarily concerned with the appropriate construction of the IOAA, the Court's interpretation appeared to be influenced by concern for constitutional constraints on the ability of Congress to delegate taxing power to agencies. For this reason, the Court in *National Cable Television* read the IOAA to permit only the imposition of fees, defined as an exaction "incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station."[96] Excluded from this definition were any exactions that might fall within the rubric of a tax, defined as payment unrelated to benefits received by the payer. For this reason, the majority concluded, fees authorized by the IOAA could be measured only by reference to the benefits received by the payer.

Wholly apart from the difficulty these opinions have created in requiring distinctions between taxes and fees and in generating judicial creativity in the discovery of feepayer "benefits," some courts have construed these cases as drawing a constitutional limit on the capacity of Congress to delegate collections that would constitute taxes.[97] Carefully read, however, neither the *National Cable Television* nor the *Federal Power Commission* case necessarily stands for that proposition. Justice Douglas's opinion in *National Cable Television* does state that Congress is "the sole organ for levying taxes,"[98] but there is little reason to believe that congressional monopoly over taxation prevents its delegation, properly constrained by safeguards and standards, any more than congressional autonomy over interstate commerce precludes delegation of that power.[99] What Justice Douglas appears to have been suggesting is that in the case of the IOAA there is no evidence that Congress *had* delegated the taxation power. The majority opinion suggests that a reasonable interpretation of the IOAA would presume that no such delegation was intended. Thus the Court suggested that reading the IOAA to permit taking into account factors other than benefit to the recipient of governmental largesse "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House."[100] Such considerations would transform assessments into taxes, "which under our constitutional regime are traditionally levied by Congress."[101] But there is no statement in the opinion implying that this heavy presumption and longstanding tradition could not be overcome by an express congressional delegation more detailed than was found in the IOAA.

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[93] 415 U.S. 336 (1974).

[94] 415 U.S. 345 (1974).

[95] 31 U.S.C. § 9701 (1982). In *National Cable Television* and *Federal Power Commission*, the Court considered an older version of the IOAA, 31 U.S.C. § 483(a) (1952).

[96] 415 U.S. at 340.

[97] *See, e.g.*, Sohio Transp. Co. v. United States, 766 F.2d 499, 503 (Fed. Cir. 1985) (holding that the Secretary of the Interior did not exceed his authority under IOAA and properly charged plaintiffs its fees); Mississippi Power & Light Co. v. NRC, 601 F.2d 223, 227 (5th Cir. 1979) (holding that monies exacted by the NRC from reactor builders were constitutional "fees" and not unconstitutional "taxes"), *cert. denied*, 444 U.S. 1102 (1980).

[98] 415 U.S. at 340.

[99] The most recent Supreme Court statement concerning the breadth of congressional power under the commerce clause is found in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

2. Fees on Constitutionally Protected Activities

Some activities susceptible to user fees under the criteria discussed in Section I involve the exercise of constitutionally protected rights. Examples include the availability of governmental facilities that foster the exercise of free speech, for example, the postal service or the maintenance of public forums such as parks.[102] Alternatively, one could view Customs Service inspections of incoming American citizens as incident to a constitutionally protected freedom to travel.[103] In each of these cases, excludable private benefits exist and beneficiaries could be assessed the marginal cost of the governmental service.

Two separate but related justifications favor financing these activities collectively through the tax system, instead of through user fees. The first would be to concede that these services generate essentially private goods, but to conclude that the underlying private activities, by virtue of being embodied in constitutional principles, qualify as the quintessential "merit goods" or "primary goods." In the rubric of Section I, denying these goods to persons unable or unwilling to pay their marginal cost would generate an "unfair" distribution of scarce resources.[104] Thus, it would be suitable to finance these goods through the tax system, even though the resulting subsidies would generate overuse from an efficiency perspective.

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[100] 415 U.S. at 341.

[101] *Id.*

[102] *See, e.g.*, Hague v. CIO, 307 U.S. 496, 516-18 (1939) (holding that under the first amendment, a labor organization cannot be denied access to a public meeting hall nor forbidden to distribute printed matter). *But see* United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 120 (1981) (holding that statute prohibiting the deposit of unstamped material in a mailbox does not violate the first amendment's guarantee of free expression).

[103] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[104] *See, e.g.*, Michelman, *supra* note 2, at 15-16. Professor Michelman postulates the existence of "just wants," the provision of which cannot properly be subordinated to other governmental objectives such as efficient allocation of resources. On the difficulty of defining the scope of a fairness-based constitutional right to particular governmental services, see Diamond, *Constitutional Limits on the Growth of Special Assessments*, 6 URB. L. & POL. 311, 319 (1984).

Alternatively, one could argue that denomination of these activities as constitutionally protected presumes that their exercise generates substantial positive externalities (the situation depicted in Figure 1). If nonparticipants or indirect participants receive benefits from the exercise of these activities, then arguably they should contribute to their occurrence through general taxation. For example, the audience watching a political rally on the steps of city hall or the populace at large that benefits from more informed voting patterns perhaps should pay (through taxes) for these benefits. The alternative of imposing fees on the audience, of course, would defeat one of the purposes of the rally—to convert those not already subscribing to the speaker's perspective—as they would be unlikely to pay to hear a view with which they initially disagreed. Indeed, given the public goods aspects of these rights, imposing fees on the direct actors would likely cause undersupply of the activities.

Substantial litigation has evolved at the state and local level concerning user fees for engaging in constitutionally protected activities. Typical cases involve municipal ordinances that require organizers of rallies or parades to post bonds for cleanup fees.[105] Courts have, quite properly, not adopted a per se approach to these fees. Rather, they have inquired into the effect that fee imposition would have on the underlying activity. The propriety of this approach seems apparent since an absolute ban would prohibit recovery of the government's cost of contributing to the activity, while full cost recovery might deter constitutionally protected activities.[106] For instance, an absolute view would presumably invalidate a requirement of placing postage on mail that carried messages protected under first amendment principles of free speech.[107]

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[105] *See* Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523 (11th Cir. 1985) (invalidating ordinance requiring police service fees), *cert. denied,* 106 S. Ct. 1637 (1986); Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050, 1055 (2d Cir. 1983) (invalidating state department of transportation administrative fee and liability insurance requirement for political march); Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257 (1985) (examining the conflict between the first amendment and traditional economic analysis of allocating the costs associated with the exercise of free speech).

[106] For a more skeptical view of balancing, see Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (arguing that using a balancing test to resolve constitutional issues "blinds us to serious problems" and that the balancing debate should be reopened).

[107] Notably, courts have found no due process violation in the analogous area of requiring a large plaintiff class to incur the costs of notification to each member of the class in order to maintain a class action, notwithstanding that the consequent expense threatens the viability of the lawsuit. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350-56 (1978) (holding that, absent special circumstances, plaintiff must pay for the cost of notice to class members); Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-79 (1974) (same).

On the other hand, unrestricted fees could unduly discriminate, on the basis of wealth, among individuals who desired to engage in protected activities. For instance, a substantial customs fee for re-entering the United States could marginally affect citizens attempting to exercise their right to travel. On a related basis, a Colorado district court has invalidated fees imposed on nonrecreational use of a road within a national monument site. The court considered assessment of a fee inconsistent with a protected property right of public use and contrary to the statutory authority of the National Park Service.[108] The result suggests that in cases involving constitutionally protected rights, an ad hoc approach would be desirable to balance the efficiency and revenue-enhancing gains of fees against the potential adverse effects on the exercise of the preferred conduct.

B. *The Statutory Scope of Permissible User Fees—The IOAA*

Assuming no constitutional restrictions on a proposed user fee, there remain various statutory limits on the capacity of administrative agencies to charge for the services they perform. The IOAA, originally enacted by Congress in 1952 and revised in a substantially equivalent form in 1982, remains the primary statute concerning the imposition of user fees by federal agencies.[109] This statute was intended to authorize a broad range of user fees, as it is predicated on the desire that agencies become "self-sustaining to the extent possible."[110] To that end, the act permits agencies to prescribe regulations establishing a charge for "a service or thing of value provided by the agency."[111] Indeed, courts have considered the congressional intent underlying the IOAA to be sufficiently pervasive that interpretations thereunder have been used to consider the meaning of other statutes that similarly grant fee-imposing authority to agencies.[112]

Nevertheless, the IOAA does not constitute a model of clarity and precision. To the contrary, the statute uses vague terms and invokes ephemeral principles that demand substantial interpretation. The statute provides little guidance concerning the constituents of a "service or thing of value" and leaves fairly open the appropriate mechanisms for computing a proper charge.[113] Instead, the statute recites considerations that are, at best, inconclusive, and, at worst, inherently conflicting. For instance, the statute mandates that charges be based on both "the costs to the Government" of providing the service and "the value of the service or thing to the recipient."[114] Nothing in the statute, however, resolves the issue where these factors substantially diverge. At best, the statute imposes on the agency an obligation to set a fee that corresponds to some conception of what is "fair."[115]

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[108] Wilkenson v. Department of Interior, 634 F. Supp. 1265 (D. Colo. 1986).

[109] 31 U.S.C. § 9701 (1986).

[110] *Id.* § 9701(a).

[111] *Id.* § 9701(b).

[112] *See, e.g.,* Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983) (interpreting cost-reimbursement practices under the Federal Land Policy and Management Act by referring to earlier regulations under IOAA and the Public Land Administration Act).

[113] *See* Note, *The Assessment of Fees by Federal Agencies for Services to Individuals*, 94 HARV. L. REV. 439 (1980) (arguing that IOAA is unclear in determining when imposing a fee is authorized, and when a fee charges the appropriate amount).

We propose that the most productive interpretation of the IOAA and related statutes requires consideration of the economic principles, elaborated in the first section of this report, that underlie an "ideal" user fee. If the function of user fees authorized by the IOAA is not simply to cause agencies "to be self-sustaining to the extent possible"—a standard best satisfied by the types of fees rejected in *National Cable Television* and *Federal Power Commission*—but also to ensure a socially optimal level of federal activity, compliance with these principles would seem mandatory. Where the decision to engage in the activity is price elastic, fees that fail to reflect those criteria will likely produce either an oversupply or undersupply of the regulated activity. Our inquiry into the interpretation of the IOAA, therefore, will consider not only the internal consistency of judicial and administrative rulings, but also the consistency of those interpretations with the principles articulated above.

1. The Need for Identifiable Benefits and Beneficiaries

The theory of efficient user fees suggests that fees should be imposed only on identifiable beneficiaries for particular benefits. Failure to link fees to particular benefits would inevitably result in the kinds of cross-subsidies that fees are intended to avoid. A fee that simply reflected a regulated firm's pro rata share of the total costs of regulation, for instance, could require that users subsidize the creation of external regulatory benefits enjoyed by the public at large. Similarly, failure to mesh costs with particular beneficiaries, even if an optimal total user fee were collected, would induce substantial gamesmanship within the regulated industries. If, for instance, an agency were to charge each member of a regulated industry a pro rata share of the regulatory budget dedicated to the conferral of total private benefits, one would anticipate that each member would attempt to capture more than its pro rata share of those benefits and thus free ride off the fees paid by others.

It is not surprising, then, that from the earliest Supreme Court interpretations of the IOAA, courts have mandated that an agency justify fees by reference to specific benefits and beneficiaries of regulatory activities. This principle is explicit in *National Cable Television* and *Federal Power Com-*

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[114] 31 U.S.C. § 9701(b)(2)(A)-(B).

[115] *Id.* § 9701(b)(1). By "fair" we mean that the agency divides the total budget of a regulatory agency by the number of regulated entities and charges each a pro rata share of the budget.

mission. In the former case, the Court invalidated FCC fees predicated on the Commission's total budget rather than on private benefits obtained by regulatees. In the latter case, the Court recognized that fees were based on private benefits derived from regulation, but found that charges imposed by the Federal Power Commission were improperly based on the agency's cost of regulating the entire industry. The Court limited the Federal Power Commission collections to "specific charges for specific services to specific individuals or companies."[116] If a company within the Commission's jurisdiction did not, within a given year, take advantage of any of the benefits offered by the Commission's regulatory scheme, that company could not be required to pay a fee during that year. Moreover, the Court was unwilling to find the requisite benefit either in the fact of regulation itself or in the adoption of a practice that benefited the industry generally. Demonstration of an individualized benefit to the payer was instead required.

This same principle is implicit in the legislative history and administrative development of user fees prior to the most recent surge of requests for nontax revenues. The Senate Committee Report on the bill that became the precursor for the current IOAA described its task as not simply revenue raising but "determining the feasibility of offsetting items now necessarily included in the Federal budget as nonreimbursable by transferring the financial burden thereof to the special beneficiaries."[117] Consistent with this intent, the Bureau of the Budget Circular ("the Circular")[118] that has been considered a primary interpretative tool for the IOAA[119] limits user fee application to an "identifiable recipient for a measurable unit or amount of government service or property from which he derives a special benefit."

Subsequent judicial interpretations have also adhered to the need for an identifiable benefit and beneficiary. Thus, the District of Columbia Court of Appeals analyzed the propriety of new Federal Communications Commission rate schedules following remand of the Supreme Court's *National Cable Television* decision by reference to a standard that "an agency must identify the activity which justifies each particular fee it assesses."[120]

2. Indicia of Identifiable Benefits

Notwithstanding this consensus that the benefits of user fees be identifiable, the concept of "benefit" is sufficiently ambiguous to produce substantial disparity among judicial decisions and substantial deviation from the public finance principles that we have suggested underlie a proper theory of user fees. Nevertheless, as judicial decisions have begun to accumulate, certain factors and tests of identifiability have evolved.

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[116] Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 349 (1974).

[117] S. Rep. No. 2120, 81st Cong., 2d Sess. 1 (1950) [hereinafter Senate Report].

[118] Bureau of the Budget, Circular A-25 (1959) [hereinafter Circular]. The Office of Management and Budget has drafted a revision of Circular A-25 to permit more flexible adoption of user fees. As of this writing, the most recent public version of the new draft was published at 52 Fed. Reg. 24,890 (July 1, 1987) [hereinafter Revised Circular].

[119] *See, e.g.*, *New England Power Co.*, 415 U.S. at 349-51 (agreeing with the Circular's interpretation of IOAA).

[120] National Cable Television Ass'n v. FCC, 554 F.2d 1100, 1104-05 (D.C. Cir. 1976).

Although courts have universally determined that regulation itself does not confer a benefit sufficient to subject members of the regulated industry to a fee, numerous judicial opinions have concluded that agency action necessary to qualify an entity for participation in the industry does constitute a benefit.[121] Some legislative history supports this view. In the Senate Report,[122] the Senate Committee on Expenditures in the Executive Department analyzed the concept of benefit that would support a fee. The Committee suggested that the processing of applications and holding of statutorily required hearings constituted "an outstanding example of a service for which a fee may most appropriately be assessed."[123] The same theory pervades the Circular, where special services that support a fee are defined to include the receipt of a license to carry on a specific business.[124]

One of the broadest statements of this doctrine occurs in the Fifth Circuit's decision in *Mississippi Power & Light Co. v. United States Nuclear Regulatory Commission*.[125] In that case, petitioners challenged NRC fees based on guidelines that permitted recovery of direct and indirect costs associated with the creation of "special benefits." The Commission defined the latter term to include all services necessary for the issuance of a required permit, license, approval or amendment, or other services necessary to assist a recipient in complying with statutory obligations under the Commission's regulations.[126] Under subsequent fee schedules, about twenty percent of the Commission's budgeted regulatory costs were considered eligible for fee recovery. Petitioners argued that all Commission regulation was for the benefit of the public; because the license or permit conferred no additional or distinct benefit on the private recipient no fee recovery was warranted. The petitioners attempted to distinguish cases, such as those involving FCC fees, in which regulation was necessary because physical limits restricted the number of licensees. Thus governmental action awarding such scarce resources conferred a benefit on the recipients of those resources. In the instant situation, petitioners argued, only traditional competitive forces restricted the number of entrants. Because any party with sufficient capital could start a nuclear power plant governmental restrictions and licenses were unnecessary, except to benefit the public at large. But if that were true, petitioners implicitly concluded, then under established principles of the IOAA no fee could be imposed on the nuclear plant operator.

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[121] *See, e.g.*, Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 734 (D.C. Cir. 1985) (holding that tariff filings were subject to fees because the filings were required by statute); Nevada Power Co. v. Watt, 711 F.2d 913, 928-31 (10th Cir. 1983) (holding that the Department of Interior could charge utility company for the cost of environmental impact study made in response to application for right of way, because study was prerequisite to the requested license); *National Cable Television*, 554 F.2d at 1101-02 (holding that certificate of compliance has become a necessary, and therefore valuable, license for cable operators, and consequently agency costs incurred in processing could be recaptured through the appropriate fee); Electronic Indus. Ass'n v. FCC, 554 F.2d 1109, 1115 (D.C. Cir. 1976) (holding that the FCC is entitled to charge for services "which assist a person in complying with his statutory duties.").

[122] SENATE REPORT, *supra* note 117.

[123] *Id.* at 4.

[124] CIRCULAR, *supra* note 118, at 2. *See* REVISED CIRCULAR, *supra* note 118, at 24,890, ¶ 6a(1)(a).

[125] 601 F.2d 223 (5th Cir. 1979).

[126] 601 F.2d at 226 n.3.

The petitioners' contention that the costs of regulation can more readily be imposed on a licensee in cases of natural monopoly has substantial appeal. FCC licenses, for instance, are a case in which governmental regulation is necessary to avoid the type of overcrowding or commons effect already described.[127] Perhaps for this reason, the Senate Report approved fees for the grantees of such licenses, noting that the license conferred "a franchise to a segment of the radio audience" (in pre-television days) and could "assure to the applicant a remunerative business under special Federal protection."[128] Once the FCC granted the license, the licensee had an effective monopoly protected by federal law. Where no such indication of market failure existed, petitioners in *Mississippi Power & Light* argued, governmental intervention was justified only by reference to external benefits—those conferred on the public at large as a result of regulation.

The Fifth Circuit paid little attention to these arguments. Rather than dealing with the purported distinction, the court responded with the blanket statement that a "license from the NRC is an absolute prerequisite to operating a nuclear facility." As such, the process of obtaining the license confers on the recipient a special benefit sufficient to support a fee. But the court also felt obligated to suggest some of the private benefits flowing from licensure. It suggested, for instance, that the limited liability enjoyed by licensed operators of nuclear plants under the Price-Anderson Act[129] and the possibility that NRC inspections would reveal safer methods of operating plants conferred sufficient benefits on the licensee to justify the imposition of a user fee. The court made no attempt to determine whether the value of these benefits was commensurate with the fees being charged. Nor did the court explain why, if plant safety were an issue, workers at the plant would be unable to induce the operator to take sufficient safety measures without governmental intervention. We are not suggesting either that there was an inappropriate relationship between limited liability and the fee charged or that workers had either the information or the leverage to bargain over safety issues. We simply suggest that the court never addressed the issue.

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[127] *See supra* notes 49-51 and accompanying text.

[128] SENATE REPORT, *supra* note 117.

[129] Atomic Energy (Price-Anderson) Act § 170, 42 U.S.C. § 2210 (1973 & Supp. I 1987).

On the other hand, the court may have had available to it arguments that the plant operators were analogous to FCC licensees. Conceivably, given the risks associated with nuclear power plants, the NRC or Congress would affirmatively ban the operation of such plants if licensing did not exist. Viewed from this perspective, licensees do, in fact, receive a benefit insofar as they are permitted to operate in an area that the government might otherwise take over or eliminate to avoid the risk of substantial negative externalities. But perhaps this argument proves too much. Government might contend that it could ban any activity that it regulates and thus all regulation would confer benefits that support fees.

Certainly, some industries would prefer no regulation to regulation, and in this subjective sense they receive no benefit from regulation. Nevertheless, each court that has addressed the issue has joined the *Mississippi Power & Light* court's judgment that industry distaste for regulation, standing alone, is insufficient to contradict the presumption of a benefit.[130] The rationale for this conclusion appears to be that fees under the IOAA are properly imposed for "voluntary acts," a standard derived from the Supreme Court's analysis in *National Cable Television*.[131] That standard presumes that if an entity voluntarily enters a business believing that the business will return benefits superior to the next best use of the entity's resources, it necessarily assumes all the burdens associated with operating that business, including the payment of fees.

Voluntariness, however, seems an insufficient justification for user fees. We put to the side the difficult issue of defining what constitutes a voluntary act and assume that the decision to enter a business in which members are subjected to a fee satisfies any test of voluntariness. Even so, the relationship between voluntariness and the propriety of fees is unclear. In some cases, imposition of a fee seems appropriate where a volitional request has been made for a governmental service, even where unaccompanied by a tangible benefit. Thus, in *New England Power Co. v. United States Nuclear Regulatory Commission*,[132] the court permitted recovery of processing costs for nuclear reactor license applications even though the applications had been withdrawn. While the applicant received no benefit from the withdrawn application, it had caused the Commission to incur processing costs by virtue of its initial filing. A subsequent change of mind ought not to impose on the public the obligation to subsidize what would otherwise be private entrepreneurial activity.

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[130] *See National Cable Television*, 554 F.2d at 1101 (disregarding as irrelevant petitioner's claim that an annual fee levied by the FCC was unjustified because the cable TV industry could have developed better without FCC regulation); Electronic Indus. Ass'n v. FCC, 554 F.2d at 1117 n.17 (holding that the FCC may charge fees for activities which are not beneficial to an applicant, but are necessary to recover the cost of any service necessarily rendered to the applicant)

[131] *See National Cable Television*, 415 U.S. at 340 ("A fee . . . is incident to a voluntary act, *e.g.* a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station.").

[132] 683 F.2d 12 (1st Cir. 1982).

Other cases suggest a more troublesome reliance on "voluntariness." Some voluntary acts, such as initiating a lawsuit that creates a useful legal precedent[133] may return such significant positive externalities that fees could induce underproduction of the activity from a societal perspective. Thus, the voluntary nature of the activity cannot be linked to the propriety of a fee. Finally, even the courts do not systematically adhere to the voluntariness notion. If voluntariness were sufficient to justify a user fee, it would not matter that the fee was either unmatched to benefits received or unjustified by a particular cost accounting method. The complaining entity could simply, and voluntarily, enter a new business. Remaining within the industry would constitute a volitional decision to pay the fee. Thus, something other than a simple appeal to "voluntary acts" must underlie the propriety of the fee system.

There is some support for the proposition that substantial amounts of regulation redound to the benefit of the regulated and give them advantages over what they would receive in a free market. The statutorily granted monopoly that flows from FCC licensing is a classic case of market failure which, without governmental intervention, would have adversely affected entrants. Indeed, recognition of the grant of a monopoly may well have been behind the Supreme Court's statement in *Federal Power Commission* that Federal Power Commission regulations provided "the foundation for the sound financial condition which public utilities and natural gas companies have achieved."[134] Similarly, the District of Columbia Circuit Court of Appeals noted in *Central & Southern Motor Freight Tariff Association*[135] that compliance with Interstate Commerce Commission regulations cloaked the transportation industry with statutory immunity from antitrust liability. In such cases, the benefits received are unique and substantial enough to support a commensurate fee. Perhaps less convincing of a tangible benefit is the same court's earlier argument that regulation gives broadcasters some "credibility in the marketplace."[136] Rather than imposing fees on the grounds that private benefits necessarily derive from statutory compliance, fees should be based on the benefit that regulatees receive from regulation, including their capacity thereby to avoid potentially adverse competition.

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[133] *See* Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 248-49 (1979) (discussing efficiency incentives to produce precedents in arbitration); Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 60 (1977) (suggesting that a precedent's efficiency depends on having both sides of a litigation take an interest in resolving it).

[134] *Federal Power Commission*, 415 U.S. at 348.

[135] 777 F.2d 722 (D.C. Cir. 1985).

[136] Electronic Indus. Ass'n v. FCC, 554 F.2d 1109, 1116 (D.C. Cir. 1976).

Indeed, some courts are reaching results independent of, yet consistent with this analysis. In the recent *Central & Southern Motor Freight Tariff Association* case, the court concluded:

> Although we need not endorse the ICC's sweeping view that a statutory filing requirement is always sufficient in and of itself to satisfy fully the private-benefit test, we believe such a requirement is sufficient where, as here, the statute was passed in large measure for the benefit of the individuals, firms, or industry upon which the agency seeks to impose a fee. Here, a principal function of the tariff-filing requirement is "insuring the economic stability of the trucking industry."[137]

The court's holding leaves open the possibility that certain activities would not be susceptible to fees solely because they were statutory prerequisites to carrying on the business, and appears to determine a fee's propriety based on whether it confers some benefit not obtainable in the market, such as monopoly or oligopoly power.

3. Relationship Between Public and Private Benefits

It would be the rare governmental activity that produced a purely private benefit. Because regulation presumably exists for the public good, a regulation that conferred pure private goods would be criticized as inconsistent with an agency's public functions.[138] The interaction of public and private effects resulting from the same activity necessarily raises the question of when, notwithstanding private benefits, the public benefits of an activity are so dominant as to preclude imposition of a fee on private beneficiaries. For instance, the legislative history of the IOAA reveals that some activities that clearly conferred private benefits were so publicly beneficial as to require insulation of the private beneficiaries from fees. Thus the Senate Committee Report[139] concluded that while clearance of drugs and food by the Food and Drug Administration "is an invaluable asset" to manufacturers, no fees related to that activity should be charged because food and drug clearance is "considered to constitute a benefit inuring predominantly to the general welfare rather than to any special interest.''[140] Similarly, the Senate Report deemed meat inspection services to be ''clearly services for which no charge could in propriety be made'' because of the overwhelming public nature of the benefits derived.[141]

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[137] *Central & S. Motor Freight Tariff Ass'n,* 777 F.2d at 734 (quoting Locust Cartage Co. v. Transamerican Freight Lines, Inc., 430 F.2d 334, 343 (1st Cir.), *cert. denied,* 400 U.S. 964 (1970)).

[138] This is not to say that purely private goods are not generated by regulation; indeed, much of the literature of public choice suggests that private goods are the driving force of publicly interested activity. *See, e.g.,* R. HARDIN, COLLECTIVE ACTION 9 (1982) ("The logic of collective action is . . . merely the logic of the efficiency of the market exchange. . . ."); M. OLSON, THE LOGIC OF COLLECTIVE ACTION 8 (1965) ("Just as those who belong to an organization or group can be presumed to have a common interest, so they obviously also have purely individual interests, different from those of the others in the organization or group.") (footnote omitted).

[139] SENATE REPORT, *supra* note 117.

In *Electronic Industries Association v. FCC*,[142] petitioners argued that the FCC could assess no fee for tariff filings and equipment approvals and certifications because the public interest served by such regulations was so important. The court rejected this proposition, noting the Supreme Court's analysis in *National Cable Television*.[143] There, the Court had determined that unless the regulatory scheme was a total failure, the serving of some public interest would be inevitable.[144] Thus, demonstration of incidental public benefit would not preclude imposition of a fee. Still, the court in the *Electronic Industries* case did require a threshold level of private benefit before a fee would be permitted. The court then distinguished between an ''incidental'' public benefit, which private beneficiaries could be required to subsidize, and ''independent'' public benefits, which were not subject to fees:

> If the Commission, in granting an equipment type approval . . . is required to incur expenses for testing or inspection, such expenses can be charged in full to the applicant. These activities have undisputed private benefits although they may also create incidental public benefits as well. But if the agency were to engage in further activity to determine whether a piece of equipment which has already been found to have no potential for creating ''harmful interference'' . . . meets standards for consumer safety it would be doing so to satisfy some independent public interest, and the charge for these additional expenses could not be included in fees imposed on equipment owners.[145]

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[140] *Id.* at 6.

[141] Of course, the recent shift from this attitude to one favoring fees for these services suggests the malleability of what constitutes private benefit. *See* UNITED STATES DEPT. OF AGRICULTURE, STUDY OF USER FEE OPTIONS FOR THE FOOD SAFETY AND INSPECTION SERVICE 4 (1986) (suggesting that user fees are justified for food safety and inspection services because meat and poultry inspections increase consumer confidence in product safety).

[142] 554 F.2d 1109 (D.C. Cir. 1976).

[143] *Id.* at 1113-16.

[144] *National Cable Television*, 415 U.S. at 343.

[145] *Electronic Indus. Ass'n*, 554 F.2d at 1109 (footnote omitted); *accord*, Mississippi Power & Light Co. v. NRC, 601 F.2d 223, 230 (5th Cir. 1979) (characterizing items properly assessed as fees as, inter alia, expenses incurred in rendering a service to a private beneficiary, but not when the expenses are incurred to serve some independent public interest), *cert. denied,* 444 U.S. 1102 (1980); *see also* Central & S. Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 730 (classifying, as an example, the FCC's costs of determining whether electronic devices will create ''harmful interference'' with existing communications networks as subsidizable by applicant fees, but classifying FCC's costs for testing these devices for safety as nonsubsidizable).

In short, if the public benefit necessarily flows from the conferral of the private benefit, the public may be entitled to free ride on the private beneficiary.[146] The extent to which this free riding is permitted, of course, depends on the allocation of costs between the public and private sector. Misallocation of costs, for instance, might lead the private beneficiaries to subsidize, and thus to undersupply from a social perspective, conduct with public goods aspects.

The appropriate allocation of costs is a separate issue to which we turn in the next section. For the moment, it is important only to note that prevailing law does not make the mere existence of public benefit a reason for precluding the imposition of a fee. Indeed, the current revision of the Circular mandates fees that would recover full cost where "incidental benefits" to the general public are provided along with benefits to identifiable persons properly subject to the fee.[147]

C. *The Allocation of Costs for Governmental Services*

If the function of user fees is to generate optimal use of governmentally provided goods and services, then one would expect costs to be allocated to users in a proportion that precisely matched the private benefit obtained. Because virtually all governmental goods and services confer both public and private benefits, however, this ideal allocation is rarely achieved. That is, external beneficiaries are necessarily subsidized by fee payers or, where services are financed out of general revenues, taxpayers subsidize private beneficiaries. Moreover, the enormous administrative difficulties involved in measuring and collecting fees based on a perfect correspondence of benefits and burdens hinders or precludes the achievement of the ideal. Still, one would expect some general principles concerning acceptable deviations from the ideal to arise. Indeed, the inability of local governments to achieve a perfect correspondence of costs and benefits in financing municipal improvements does not transform a permissible user fee into an impermissible tax. Instead, courts have permitted localities to use fee systems despite unavoidable cross-subsidies. Thus courts have permitted municipalities to charge rates for municipal services such as water and sewer supply that not only meet the system's current capital needs and operating expenses, but that also include amounts usable for future capital outlays.[148] Although current residents will subsidize subsequent residents, courts have justified the additional charge on the theory that "raising capital for future use by means of rates and charges may permit a municipality to take advantage of favorable conditions, which would alter before money could be raised through issuance of debt securities."[149] Indeed, most courts have gone further to permit municipal utilities to charge rates that reflect a "reasonable profit," which is then committed to the municipal general treasury.[150] Any such profit may involve a subsidy from ratepayers to taxpayers, as the amounts diverted are usable for municipal purposes that have nothing to do with the utility for which rates are charged. The diversion could be justified on the theory that some utility functions are paid for out of the general treasury—police and fire protection, for example—so that the payment of utility "profits" to the locality simply constitutes reimbursement of those expenses. But because any relationship between utility profits and municipal expenditures on utility property may be purely coincidental, cross-subsidies are likely to remain.

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[146] *See Central & S. Motor Freight Tariff Ass'n*, 777 F.2d at 735 (holding that public benefits incidental to agency's provision of private benefits were not independent public benefits, and therefore nondeductible from agency assessments).

[147] *See* Revised Circular, *supra* note 118, at 24891, ¶ 6a(2),(3). "Full cost recovery" is defined to include an annual rate of return on the government's capital resources dedicated to the regulatory effort. *See id.*, ¶ 6d.

[148] *See, e.g.*, Hayes v. City of Albany, 7 Or. App. 277, 490 P.2d 1018 (Or. App. 1971) (holding that where ordinances providing for sewer user fee and for increased connection charges specifically provided that proceeds be used to develop and

One might anticipate that federal as well as municipal user fees would be subject to limited flexibility in attempting to allocate the costs of services benefiting different groups. The IOAA, however, provides little guidance on the allocation of costs for services that are neither purely private nor purely public. The statute indicates only that any charge is to be:

> (1) fair; and
> (2) based on—
>   (A) the costs to the Government;
>   (B) the value of the service or thing to the recipient;
>   (C) public policy or interest served; and
>   (D) other relevant facts.[151]

Although this statute apparently allows an agency to make virtually any

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maintain sewage disposal system, such ordinances were a valid exercise of power, provided that the levy charged was reasonably commensurate with the burdens imposed on the sewage system); Hartman v. Aurora Sanitary Dist., 23 Ill.2d 109, 177 N.E.2d 214 (1961) (holding that a service or connection charge levied under the Illinois Sanitary District Act of 1917 was a valid method of financing needed extensions in the sewage system).

[149] Contractors and Builders Ass'n v. City of Dunedin, 329 So.2d 314, 320 (Fla. 1976).

[150] *See, e.g.*, Pinellas Apartment Ass'n v. City of St. Petersburg, 294 So.2d 676, 678 (Fla. Dist. Ct. App. 1974) ("There is nothing inherently wrong with the city making a modest return on its utility operation or certain portions thereof, provided the rate is not unreasonable in light of the service provided."); Apodaca v. Wilson, 86 N.M. 516, 524, 525 P.2d 876, 884 (1974) (holding that, because a city was acting in a business or proprietary capacity instead of a governmental capacity, it could charge fees in excess of operating costs as long as the fees were reasonable compared to what private utility companies charged).

[151] 31 U.S.C. § 9701(b) (1983).

allocation it desires, both legislative history and subsequent judicial interpretations have attempted to impose some order on its unregimented standards. Unfortunately, those interpretations are neither internally consistent nor necessarily compatible with the public finance principles discussed previously.[152]

The Senate Report apparently presumes that general taxation would subsidize governmental services. Accordingly, any doubts as to the appropriate measure of private benefit were to be resolved against use of fees. The Report concludes that where "there is a joint benefit to a particular beneficiary and to all of the people, the cost should be equitably divided, and where there is doubt as to the degree or preponderance of benefit, there should be no fee."[153]

Some judicial opinions, however, apparently entertain the contrary presumption. They permit the government to recover through user fees the full cost of a service that confers a special benefit, notwithstanding that the same service simultaneously generates public benefits. In short, the "incidental" public benefit, may, under these decisions, be fully subsidized by private beneficiaries.

The opinion in *Mississippi Power & Light Co. v. NRC*,[154] is particularly instructive in this area. In that case, petitioners contended that some public benefit inhered in NRC regulation and that such portion of the service should be excluded from any fee assessment.[155] The Commission argued that it was not required to segregate public and private benefits, but could instead recover the full cost of providing a service to a private beneficiary.[156] The Court of Appeals for the Fifth Circuit agreed with the Commission and suggested that no allocation was required once a threshold amount of private benefit had been determined.[157] The court permitted NRC to recapture the full costs of nuclear plant inspections because it determined that identifiable beneficiaries obtained identifiable benefits from those activities. The court cited in support only the District of Columbia Circuit Court's opinion in *Electronic Industries Association v. FCC*,[158] which also rejected a strict allocation requirement. But this use of *Electronic Industries* is misleading if not disingenuous. The *Electronic Industries* court in fact remanded the FCC's fee structure on the grounds that the FCC had not demonstrated a link between fees imposed and benefits conferred. The court implicitly accepted the notion that, while exactitude was not required, fees had to be predicated on some reasonable allocation between public and private benefits. In fact, the FCC ultimately abandoned much of its fee-collecting efforts because of the court's allocation requirements.[159]

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[152] *See* SECTION I *supra*.

[153] SENATE REPORT, *supra* note 117, at 3-4.

[154] 601 F.2d 223 (5th Cir. 1979).

[155] *Id.* at 229.

[156] *Id.*

[157] *Id.* at 229-30.

[158] 554 F.2d 1109, 1112-13 (D.C. Cir. 1976) (remanding for reconsideration fees set by strict allocation).

As suggested above, allowing full-cost recovery may induce undersupply of activities that generate positive externalities. If a private beneficiary must subsidize public benefits and cannot recapture those benefits through pricing mechanisms—a real possibility where the external benefits take the form of public goods not susceptible to marginal cost pricing—the private beneficiary probably will not engage in an optimal level of the activity from a societal perspective. For some activities, such as licensing, the effect of full-cost recovery may not be evident for any particular case; any applicant may still consider the benefits of seeking a particular approval worth the fee charged. Borderline applicants, however, could be inadvertently deterred.

Courts, however, have imposed some constraints on the level of permissible fees. The Supreme Court in *National Cable Television* restricted the FCC to fees measured by the value of the service to the recipient. Any cost incurred by the agency in excess of the value received by the recipient would be paid through general taxation, even if the agency service generated a purely private good. Thus, the District of Columbia Circuit in *Electronic Industries* required any gradations in fees to be linked to graduated costs incurred by the agency rather than to gradations in revenues received by the fee payer.[160] The court assumed that a given service creates a set value of benefit regardless of revenues. Yet, the same court permitted fees to be scaled to the number of subscribers of any cable company on the theory that those companies with more subscribers received relatively greater benefits from FCC licensure.

While other courts also have limited fees to the value received by the recipients, such a limit effectively places a ceiling on the remainder of the statutory language. That language expressly authorizes consideration of costs to the government and "other relevant facts" in setting the amount of a fee. Other courts have reconciled that language by suggesting that cost to the government may be considered, but only as an alternative ceiling on the fee.[161] One court has avoided the conundrum by equating governmental cost with recipient benefit.[162] In effect, then, courts limit fees to either cost to the government or value to the beneficiary, whichever is lower.[163]

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[159] *See* T. Seoh, Memorandum to User Charge Task Force of Department of Health and Human Services (Oct. 13, 1982), *reprinted in* DEPARTMENT OF HEALTH AND HUMAN SERVICES, USER CHARGE STUDY, 1983 (Attachment II) (tracing the history of difficulties the FCC faced in meeting the Court's allocation requirements).

[160] *Electronic Indus. Ass'n*, 554 F.2d at 1112-13.

[161] *See, e.g.,* Central & S. Motor Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985) (enunciating three criteria for fees, including that the fee exceed neither the cost to the government nor benefit to recipient); *Mississippi Power & Light Co.*, 601 F.2d at 230 (holding that fee assessed may not exceed government costs); *Electronic Indus. Ass'n*, 554 F.2d at 1114 (suggesting that cost may be a basis for fees, but a desire to increase regulator's revenues may not be a basis if there is no increased cost to the government).

There are some courts, however, that have looked beyond costs to the government or value to the recipient in setting charges. In *Yosemite Park and Curry Co. v. United States*,[164] for instance, the Court of Claims authorized the National Park Service to charge a concessionaire utility rates based on comparable private utility rates rather than the government's cost of production. The court believed that the IOAA guidelines were intended to avoid undercharging for governmental services, and thus to permit charges in excess of cost. If the lower federal production cost in fact reflected cross-subsidies from other federal activities, the conclusion of the court in *Yosemite Park* may be persuasive. Because the concessionaire otherwise would have had to purchase electricity from private utilities, those rates may have accurately reflected the value of the service it actually received. The court, however, did not extend its inquiries or analysis that far.

Finally, the courts are divided over how to interpret the IOAA regarding the issue of allocating agency overhead costs to a special beneficiary. Here again, the Fifth Circuit has given the broadest interpretation to permissible fees, permitting recovery of overhead and technical support costs demonstrably associated with the provision of special benefits.[165] The Tenth Circuit has taken a more conservative stance. In *Nevada Power Co. v. Watt,*[166] the court considered a statute that specifically authorized collection of "actual costs" but expressly prohibited collection of "management overhead." The court permitted the agency to collect administrative costs and "indirect costs" that did not constitute the general costs of agency administration. Moreover, the court appeared to place on the payer the obligation to demonstrate that indirect costs assessed included an amount for the prohibited category.

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[162] *See* Public Serv. Co. v. Andrus, 433 F. Supp. 144, 153 (D. Colo. 1977) (Bureau of Land Management reimbursement fees limited to governmental cost because "[i]t is the cost to the agency which determines the value to the recipient").

[163] This standard for limiting fees is consistent with the predominant standard in local government law that allows recovery through special assessments of improvements that return a special benefit to a limited segment of municipal residents. *See, e.g.,* McNally v. Township of Teaneck, 132 N.J. Super. 442, 334 A.2d 67 (N.J. Super. Ct. Law Div. 1975) (remanding assessment because township could not show that cost was the only factor in determining fees or that cost did not outweigh special benefit to properties assessed) *rev'd in part on other grounds,* 75 N.J. 33, 379 A.2d 446 (1977).

[164] 686 F.2d 925 (Ct. Cl. 1982).

[165] The cost of performing a service . . . involves a greater cost to the agency than merely the salary of the professional employee who reviews the application. The individual must be supplied with working space, heating, lighting, telephone service and secretarial support. Arrangements must be made so that [the employee] is hired, paid on a regular basis and provided specialized training courses. These and other costs such as depreciation and interest on plant and capital equipment are all necessarily incurred in the process of reviewing an application.

Mississippi Power & Light Co. v. NRC, 601 F.2d 223, 232 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980).

[166] 711 F.2d 913 (10th Cir. 1983).

D. *Additional Statutory Authority for User Fees*

1. Specific Statutes as Substitutes for Inquiries into Benefit

Although the IOAA is the most general federal user fee statute and the one that has been subject to the most litigation, a wide variety of other statutes authorize federal agencies to charge for services. For the most part, fees derived from these statutes have been directed at specific activities and have implicitly limited fee imposition to direct beneficiaries of particular services. For instance, under the National Aeronautics and Space Administration Act of 1959,[167] the National Aeronautics and Space Administration imposes fees based on a portion of total launch cost to companies that use space shuttles to launch privately owned satellites. In more mundane matters, the Land and Water Conservation Act of 1965[168] authorizes the Department of the Interior to impose daily fees for campsites and vehicle entrances to national parks. The Department of Justice also may charge individuals who seek to utilize Federal Bureau of Investigation fingerprinting services.[169] Similar programs exact fees for government services rendered in reviewing patent design applications,[170] providing grazing areas,[171] and issuing passports.[172]

In practice, the benefits criterion need receive little if any agency attention under many of these statutes. The obvious service recipient is both fee payer and main beneficiary, and the agency's outlays form a measure of the benefit rendered. The agencies collect fees sufficient to cover all of the programs' expenses. For example, the Department of Energy recovers from nuclear power plants all its costs of storing their spent nuclear fuel,[173] and it updates these user fees annually.[174] Similarly, under the United States Grain Standards Act,[175] the Department of Agriculture recovers from the grain industry all expenses incurred by the Federal Grain Inspection Service for inspection and weighing services; indeed the agency states its aim is "to respond to the grain industry's need for quality service."[176]

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[167] 42 U.S.C. § 2460 (1973).

[168] 16 U.S.C. § 460*l*-6a (1983).

[169] 15 U.S.C. § 78(q) (1981); 7 U.S.C. § 12(a) (1980).

[170] 35 U.S.C. § 41(a) (1983); 15 U.S.C. § 1113 (1983).

[171] 1978 Public Rangelands Improvement Act, 43 U.S.C. § 1905 (1986).

[172] 22 U.S.C. § 214 (1979) (Supp. 1987).

[173] Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101-10226, § 10156 (providing for payment of fees to Secretary).

[174] Fees for Federal Interim Storage, Calendar Year 1987, 51 Fed. Reg. 43,765 (1986).

[175] 7 U.S.C. § 79(j), (l) (1980) (Supp. 1987).

Benefit-related activities also dominate the federal actions that the President's Private Sector Survey on Cost Control identified as susceptible to increased fees. For instance, the Report on User Charges[177] issued by the Survey recommends initiation of or increases in charges imposed for Freedom of Information Act requests to "identifiable users," and Coast Guard services provided to "identifiable beneficiaries."[178]

Other statutes, however, do not clearly explain the relationship they create between fees imposed and benefits conferred. These statutes occasionally have been the subject of litigation to clarify inherent ambiguities in the proper basis for federal charges. In *Nevada Power Co. v. Watt,*[179] the court considered the circumstances under which fees imposed by the Department of the Interior for processing applications for rights of way on public lands would be "reasonable" as that term was used in the Federal Land Policy and Management Act of 1976 ("FLPMA"). In defining the scope of "reasonable costs" incurred through government action (and hence reimbursable under the Act) Congress provided a substantially more detailed litany in the FLPMA than in the IOAA of activities for which costs are recoverable. For instance, the FLPMA specifies that recoverable actual costs exclude management overhead but include various opportunity costs. The FLPMA, however, also requires consideration of the public benefits that arise from federal action.

In *Nevada Power*, the Tenth Circuit interpreted as mandatory facially discretionary language concerning factors relevant to the imposition of fees.[180] Regulations that set fees could be defended only by demonstration that the Department of the Interior had, in fact, considered the indicia of "reasonableness" contained in the statute. The court viewed these indicia as limiting the capacity of the Secretary of the Interior to impose on applicants all their application costs. Presumably, the statutory requirement to consider public benefit would compel some discount of total costs incurred by government. Further, the court held that regulations be promulgated only after each of the statutory indicia was considered. A review of the criteria considered most relevant by the Secretary in a given case would be inadequate. In short, the specific criteria of FLPMA constricted far more than the nebulous guidelines of the IOAA the discretion of the Department to consider indicia of reasonableness.

FLPMA also circumvents the difficult issue of determining whether specific governmental activities confer sufficient benefit on an applicant to warrant a request for reimbursement. The Act, for instance, specifically authorizes reimbursement for costs incurred in the review of an environmental impact statement.[181] Either Congress was willing to impose these costs despite the absence of any benefit to the applicant, or Congress resolved the debate over environmental impact statements by concluding that they did return reimbursable benefits to applicants. The court in *Nevada Power*, however, did not decide between these interpretations. If it had determined that benefits were inadequate to trigger reimbursement, the court would have had to decide the constitutional issue reserved by the Supreme Court—whether Congress could confer on agencies the power to levy non-benefit taxes. Instead, the court distinguished the Supreme Court cases and held simply that the "reasonableness" criterion of FLPMA required discounting the cost of any environmental impact statement by the public benefit that it conferred.[182]

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[176] 7 C.F.R. § 800 (1986).

[177] REPORT ON USER CHARGES, *supra* note 10.

[178] *Id.* at 183-91 (FOIA requests); *id.* at 168-82 (Coast Guard services).

[179] 711 F.2d 913 (10th Cir. 1983).

[180] *Id.* at 920-21.

2. The Passing of "Benefit" Related Fees

Recently, Congress has considered elimination of explicit requirements, such as those found in the IOAA, that fees be linked to particular benefits. Instead, Congress has authorized fee collection tied to a percentage of agency budget. Under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), for instance, Congress requires the Nuclear Regulatory Commission ("NRC") to collect fees from licensees in an amount up to 33% of the costs incurred by the Commission in any fiscal year.[183] The legislative history indicates that these charges were intended to be predicated on a standard "separate and distinct from the Commission's existing authority" under the IOAA in order to permit fuller recovery of the costs of regulation.[184] The NRC has indicated that this authority will permit it to increase its fees from previous levels of $37 million per year to one-third of its annual budget, or $134 million for Fiscal Year 1987.[185]

Similarly, COBRA amended the Communications Act of 1934 to prescribe charges for certain regulatory actions of the Federal Communications Commission that might have been suspect under the IOAA.[186] For instance, the

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[181] Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1986 & Supp. I 1987).

[182] *Nevada Power Co.*, 711 F.2d at 933.

[183] *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272 § 7601, 100 Stat. 117, 146 (April 7, 1986).

[184] 132 CONG. REC. H879 (daily ed. Mar. 6, 1986) (statement of Rep. Gray); 132 CONG. REC. S2725 (daily ed. Mar. 14, 1986) (statement of Sen. Simpson).

[185] Annual Fee for Nuclear Power Reactors Operating Licenses or Applications and Major Materials Licenses and Conforming Amendment, 51 Fed. Reg. 24,079 (1986) (to be codified at 10 C.F.R. §§ 51, 71) (proposed July 1, 1986) [hereinafter Annual Fee for Nuclear Power Reactors].

[186] Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272 § 5002, 100 Stat. 117, 117-21 (April 7, 1986).

Commission fees as passed are based primarily on the cost of providing particular services rather than on the value of the benefits conferred on regulatees.[187] Although the Commission contended that it was not imposing fees under statutory authority for benefits conferred on the public at large, COBRA presumably avoids the difficulties of proving benefits and allocating costs that were imposed by the requirements of the IOAA.[188]

These statutory provisions have various implications for realization of optimal levels of government services. Insofar as authorizations such as those conferred on the NRC disavow any linkage to particular benefits, there is no reason to believe that fees will induce an appropriate level of regulation or request for government services. To the contrary, any relationship between fees imposed and appropriate levels of services provided may be wholly coincidental. The user fee in this situation becomes largely a revenue-raising device imposed on particular recipients of government services. Such a device, although denominated a charge or user fee, is in essence a redistributional tax. This conclusion does not necessarily condemn the exaction, as Congress has the constitutional power to levy taxes.[189] From a political perspective, however, denomination of the revenue raising device as something other than a tax is, at best, disingenuous.

The authorization for new FCC fees may lie on a different foundation. As recounted above, much of the judicial interpretation of the IOAA relates to FCC attempts to comply with that statute. On each occasion, the Commission's attempts to impose and allocate fees were frustrated by failure to comply with technical requirements. The effective result was that the Commission had no substantive authority to impose fees for its regulatory activities. To the extent that the new statutory fees attempt to avoid the technical rigors of the IOAA while still requiring some linkage between the fee and the cost of particular services, these fees may be perceived as ''rough guesses'' of what would be permissible under the general statute. If this is true, the new fee schedule may generate efficient results insofar as it recaptures from reduced transaction costs related to more exacting calculations what it loses through imprecision.[190]

Even if this justification held true initially, the rigidity of statutory fee schedules may cause subsequent deviations from this efficiency model. If the Commission were to alter its requirements for a particular approval, the costs of processing applications for such approvals might increase or decrease. Nevertheless, an approval-based fee schedule such as the one enacted would not adjust for the alteration in Commission costs. Instead, the Commission would have to return to Congress for any changes in the statutory schedule. While COBRA requires fee adjustments to occur in accordance with the Consumer Price Index, there is no reason to believe that FCC costs will change in direct proportion to that standard. Even if there currently exists a rough trade-off between calculation costs and fees in excess of benefits, that trade-off cannot be expected to continue through the long term.

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[187] *See* Fee Collection Program, *supra* note 19 at 25,794 (adopting fees as mandated by Congress).

[188] *See id.*

[189] *See supra* notes 93-101 and accompanying text.

[190] *See* Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

Most recently, Congress has eschewed any attempt to approximate the private benefits component of the user fee calculus. Instead, the Omnibus Budget Reconciliation Act of 1986[191] permits broad discretion to recover total costs of an agency's budget. Section 3401(1) of the Act requires the Federal Energy Regulatory Commission ("FERC") to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year."[192] No explicit link is required between fees imposed and benefits conferred. Instead, section 3401(2) sets the standard that fees or charges "shall be computed on the basis of methods that the Commission determines, by rule, to be fair and equitable."[193] It is, of course, conceivable that the Commission would attempt to meet that criterion by imposing charges in proportion to private benefits conferred.[194] Because the legislation requires full cost recovery, however, limitation of fees to benefits could exist only if FERC performs no regulatory activities that accrue to the public. This, of course, is the very situation that Justice Douglas in *National Cable Television* refused to assume because it would render the regulatory scheme—presumably predicated on public benefit—a "failure."[195] Beyond Justice Douglas's rhetoric, the economic theory of the previous section[196] suggests that some regulatees consequently would cross-subsidize activities that confer public benefits. This in turn would deter fee payers from engaging in otherwise efficient levels of private activity.

The same legislation approved the imposition on importers of a 0.22 percent ad valorem fee by the United States Customs Service for processing imported merchandise.[197] The ad valorem fee ultimately is intended to cover federal appropriations to the Customs Service for salaries and expenses incurred in conducting commercial operations. While the commercial operations limitation suggests that fees will be assessed only on activities that produce private benefits, there is little reason to believe that customs expenditures on any given merchandise necessarily correlate to the value of that merchandise, and even less reason to believe that private benefits consistently reflect 0.22 percent of that value. To the extent that these relationships do not exist, the spectre of cross-subsidies arises once again.

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[191] Pub. L. No. 99-509, 100 Stat. 4599 (1986).

[192] *Id.* at § 3401(a)(1); 100 Stat. at 4615.

[193] *Id.*

[194] In fact, the FERC proposal would base charges on annual volume of energy transported. Annual Charges Under the Omnibus Budget Reconciliation Act of 1986, 52 Fed. Reg. 3128 (1987) (to be codified at 18 C.F.R. §§ 375, 382) (proposed Feb. 2, 1987).

[195] National Cable Television Ass'n v. United States, 415 U.S. 336, 343 (1974).

[196] *See* SECTION I, *infra*.

[197] *See* Ad Valorem User Fee Amendments, 51 Fed. Reg. 43,188 (1986) (to be codified at 19 C.F.R. § 24.23).

III. User Fee Implementation Issues

Our concern to this point has been with the economic and legal theories that underlie federal user fees. In this section, we turn to a more detailed investigation of whether those fees that currently exist or that have been proposed conform with the principles that derive from theory. In particular, we investigate whether administrative and interpretive issues that necessarily arise in the implementation of user fees might endanger a fee program's objectives.

Our discussion in this section draws on studies of user fees, proposed and existing agency rules, and interviews that we have conducted with personnel from a variety of agencies and affected interest groups.[198] Because our objective in this section is to analyze the propriety of fees in general, we examine particular issues that raise a representative set of questions about fees. We do not concentrate on particular agencies or particular kinds of fees, but rather consider a cross-section of issues related to areas in which there is room for substantial deviation from rules that would emerge from the underlying theory. We do not cover all fees imposed by the federal government, but rather investigate issues of implementation, definition, and disposition that have generated substantial disparity among agencies.

A. *Procedural Constraints*

1. Limitations on the Ability to Impose Fees

Even an agency that desires only to impose fees that reflect benefits to identifiable users may encounter substantial legal or practical difficulties in implementation. For instance, costs of perfectly administering a user fee structure may exceed the revenues to be gained. In this situation, the conflict between revenue enhancement and allocative efficiency goals may best be resolved through less exacting estimation of agency costs or user benefits. Assuming that allocative efficiency remains the primary goal of a user fee schedule, however, the mechanism employed to compensate for administrative or legal difficulties should be designed to minimize deviations from results that would be obtained without those obstacles. Nevertheless, achieving allocative efficiency may be frustrated by the possibility that any compromise system may generate undesirable and nonquantifiable by-products that adversely affect both the allocation of governmental services and the social benefits attained through those services.

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[198] Personnel in the following agencies and departments have been kind enough to meet with us: Federal Communications Commission, Department of Transportation, United States Customs Service, Department of the Interior, Nuclear Regulatory Commission, Environmental Protection Agency, Food and Drug Administration, Federal Energy Regulatory Commission.

Recent developments in the Environmental Protection Agency concerning user fees illustrate the problem. Section 26(b) of the Toxic Substances Control Act ("TSCA") authorizes the EPA to impose fees on persons submitting data and seeking EPA review of various notices, such as premanufacture notices (PMNs), significant new use notices, and exemption applications. TSCA, however, imposes statutory limits on these fees, and the limits—$2500, but $100 for a "small business concern"—are substantially below actual agency costs expended in the review process.

In light of this low statutory fee ceiling, and recognizing the unavoidable administrative costs associated with user fees, one basic issue is whether any fee collection effort makes much sense. Certainly low statutory fee ceilings seriously constrain the utility of a fee mechanism. Working within this constraint, EPA has considered two alternative fee structures, realizing that neither would allow full recovery of agency costs. The first alternative is a flat fee set at the maximum level allowed by statute. Flat fees reduce administrative costs, as each submitter within a class, "small business concern" or all others, would be charged the same amount. Flat fees would also maximize authorized revenues, as each submitter would be charged the full statutory fee. A flat fee may have the drawback, however, of discouraging some firms from submitting premanufacture notices or other documents that produce information of public benefit. Indeed, the EPA has suggested that profits on some substances may be sufficiently marginal that the imposition of an undifferentiated fee could discourage chemical innovation and constitute a bias against new business ventures and in favor of existing ones.[199]

The second alternative is a differential fee keyed to a variety of factors. Agency resources expended on review may vary substantially from submission to submission, depending on the inclusion of test data, reactivity levels in the chemicals concerned, and the expected volume of production. Also, processing applications may require additional resources if firms request that their submissions be treated as confidential business information. In such cases, EPA expends resources protecting the interests of the submitter. Varying fees would have the converse costs and benefits as flat fees: maximum fee revenues would not be realized, but firms would be less deterred from innovation.

A flat fee in the maximum amount might not cover full EPA costs in any of these cases, and it would fail to distinguish between those firms that impose greater and lesser burdens on the agency. Firms would have little incentive to economize on the burdens their submissions impose on the agency. Although some free riding by submitting firms could be expected in any event, it might be minimized by reducing fees to those firms that required relatively few EPA services. A plausible alternative basis for such differentiation could be expectations that fee levels would loom large relative to potential profits. Despite these potential benefits, any such system would substantially increase administrative costs.

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[199] *See* EPA, PMN User Fees Background Paper (June 9, 1986).

It would be difficult to make a sound choice between flat and differentiated fees using only quantitative information about consequences. Too many important factors, such as the lost benefits of discouraged research, the utility of confidential business information, the public benefits of PMNs, are simply nonquantifiable. Resolution of these difficulties may well have to turn on judgment about ambiguous or unpredicted consequences.

The problem of low statutory ceilings on user fees is common to many program areas. Seven federal land management agencies—National Park Service, Forest Service, Fish and Wildlife Service, Bureau of Reclamation, Bureau of Land Management, Corps of Engineers, and Tennessee Valley Authority—all administer recreational areas at which user fees logically could be collected. Congress, however, has sharply restricted the role of recreational fees, primarily through a succession of amendments narrowing the user fee authority established by the Land and Water Conservation Fund Act of 1965.[200] That act allows various types of fees (such as park entrance fees and camping fees), and provides fee-setting criteria that resemble those of the IOAA. But fees are not suitable for all sites; if a park has multiple entry points and relatively few visitors, for example, collecting fees would be quite costly.[201] Yet many facilities without multiple entry points are congested, and maintenance funding is severely constrained—conditions well suited to user fees. Nonetheless, entrance fees are expressly prohibited or limited for many recreational areas, including congested facilities, where higher fees would be efficient. It is unclear whether these restrictions on fees are predicated on a Congressional perception that some fairness considerations preclude fees that would serve allocative efficiency goals or whether these restrictions result from political influence of those who would be subject to fees.[202]

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[200] *See* PARKS AND RECREATION, *supra* note 12, at 1-2 (letter to Chairman of Subcommittee on Public Lands, Reserved Water and Resource Conservation, Committee on Energy and Natural Resources, United States Senate from Director, Resources, Community, & Economic Development Division, General Accounting Office).

[201] In such a situation, not only would staffing of multiple entry points raise costs, but lack of congestion would also indicate that marginal costs imposed by additional users would be minimal, so that user fees would induce suboptimal use. *See* R. MUSGRAVE & P. MUSGRAVE, *supra* note 21, at 56 (discussing market failure due to nonrival consumption).

2. Fee Collection Procedures

Once the government determines to impose a user fee for a particular service, various details remain to be decided concerning the collection of the charges. The legal criteria for a user fee generally offer considerable flexibility to the agency in addressing such details. Some arrangements, however, may better achieve the underlying goals of the user fee program, or, indeed, other objectives of the fee-imposing agency. Fee collection procedures, for instance, may clarify or obfuscate appropriate signals to beneficiaries concerning the use of government services. In particular, whether the fee is collected before or after the service is rendered may affect the demand for the service, even though its objective utility remains constant.

The Coast Guard, for instance, has for some time sought, without success, Congressional approval of user fees for recreational and commercial boaters. A fee for rescue of imperiled boaters could be collected by assessing each boater a fee at the time of registration. The fee would reflect the expected cost of rescue—the cost of actual rescue discounted by the probability that rescue would be necessary. Alternatively, the Coast Guard could impose its fee ex post, assessing substantially greater charges on those few boaters who actually became imperiled. On the (arguable) assumption that even those who never utilize Coast Guard services benefit from them, either of these collection plans is defensible. They might, however, create disparate incentives for boaters. Ex ante payments, like insurance premiums, could create moral hazards by inducing individuals who had already incurred costs of rescue to engage in riskier activities. This possibility initially suggests that ex post collections might be favorable. Nevertheless, very few would tolerate a government agency either failing to rescue because the potential rescuees could not pay the cost of the rescue or attempting subsequently to obtain compensation from rescuees. Even those who recognized the allocative efficiency gains of such a program might raise opposition based on what we have described above as a fairness concern—a belief that government has the obligation to assist endangered citizens wholly apart from the individual's ability (or even unwillingness) to pay. Thus, even where potential feepayers rationally determine ex ante that payment for rescue services is unwarranted relative to the expected loss of nonrescue, social values seem to shift markedly in the ex post situation. Recent examples of earthquake victims, construction accident victims, and children caught in empty wells reveal our willingness to spend vast resources on an endangered identifiable life that were considered unwarranted by an ex ante calculation of risks to statistical lives.[203]

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[202] *See infra* notes 253-60 and accompanying text.

Not all decisions concerning collection of fees are as dramatic as Coast Guard rescue. The Environmental Protection Agency has encountered a similar problem about timing of collection with respect to fees payable for review of PMNs.[204] Several of the substances for which PMNs are desirable never achieve successful commercial marketability. The introduction of additional "up front" charges may induce manufacturers to eschew PMNs or to limit their research concerning substances with a relatively low likelihood of commercial success. The EPA, therefore, has considered deferring the payment of a fee until notice of commencement of production. The agency suggested that this timing would impose less of a burden on innovation.[205] Yet, the agency simultaneously recognizes that fee deferral would substantially reduce revenues, in that only 45 percent of all PMNs it receives ultimately reach commercial production. The effect would be to fill the gap with tax revenues, thereby cross-subsidizing manufacturers. Nevertheless, the information obtained by EPA in the process of analyzing substances for review constitutes a public good, the cost of which should be publicly financed.

The issue whether to impose fees ex ante or ex post may also properly depend on agency familiarity with the product or service submitted for government action. Some activities may entail tasks sufficiently repetitious that a standard fee exacted at the outset corresponds to the effort actually expended. Administrative costs also would be minimized by a flat fee imposed in each individual case. Furthermore, benefits would closely match burdens. For instance, if license applications generally contain the same quantity and quality of information, an agency would be able to calculate in advance the approximate processing costs. This process would reduce the risk of nonpayment and would minimize the costs of collecting from delinquents. Several agencies, therefore, have established fee schedules that link fees to particular tasks.[206]

Where the costs incurred by an agency vary substantially each time the task is undertaken, however, fees may better be assessed according to actual time expended. The NRC, for instance, perceives the inspection of each plant as a discrete task. Because of the various structural, engineering, and design differences among nuclear power plants, inspection or licensing approval time may vary significantly from plant to plant. Thus, the NRC requires its employees to keep substantial records. These time records are ultimately calculated into a final bill that is presented to the regulatee at the conclusion of the Commission's task.

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[203] T. SCHELLING, *The Life You Save May be Your Own*, in CHOICE AND CONSEQUENCE 115-18 (1984); Mishan, *Evaluation of Life and Limb: A Theoretical Approach*, 79 J. POL. ECON. 687, 693 (1971).

[204] Premanufacture notices contain information about a new chemical product required by the EPA before a firm can manufacture the product commercially.

[205] *See* EPA, *supra* note 199.

[206] This route has been followed by the FCC and the NRC. *See* Fee Collection Program, *supra* note 19, at 25794 (FCC); Annual Fee for Nuclear Power Reactors, *supra* note 185, at 24082 (NRC).

Additionally, from the perspective of revenue enhancement, ex ante collections seem superior to ex post collections insofar as they minimize the risk of nonpayment. The collection system potentially could be linked to an existing system of collection for registrations. For example, if one early stage of registration—of a boat or airplane, for example—already exists, a user fee for subsequent service, such as rescue or navigational maps, could be collected simultaneously.[207] Any ex post system might require an additional level of administration.

One promising intermediate possibility is a two-part user fee now under study by the Environmental Protection Agency for its pesticide regulatory services.[208] The agency's pesticide activities entail, among other things, two cost elements: administrative costs of processing an application to register a new pesticide (registration is necessary before a producer can market a new product), and science review costs arising in part from the firm's initial data submission and in part from later developments that raise new environmental risk questions. The user fee could be structured as a one-time applicant fee covering administrative costs, coupled with an annual fee[209] covering science reviews. The annual fee could be either flat, with all current producers sharing that year's total science review cost, or differentiated, reflecting the relative completeness of submitted data bases and EPA's cost incurred to determine the risks and benefits by certain classes of chemicals. EPA believes such a two-part user fee could have both efficiency and fairness advantages; but this gain would not be costless, as implementation complexities would rise.

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[207] If much time passes before service is provided, an adjustment might be advisable to reflect forgone earnings on the fee.

[208] *See* Regulations for the Imposition of Fees for Certain Activities Conducted Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 51 Fed. Reg. 42,974, 42,979 (1986) (to be codified at 40 C.F.R. § 152) (considering a two-part approach to recover costs of pesticide regulatory services).

[209] Annual payments are a feature now of some licensing/inspection programs, but they are not always interpreted as user fees. The Federal Energy Regulatory Commission, for example, distinguishes between user fees, adopted under the IOAA and keyed to applications, and annual charges adopted under other statutes, mainly the Federal Power Act. The latter do not have a clear "benefits received" emphasis. Other agencies make no such distinctions. As called for by the Consolidated Omnibus Budget Reconciliation Act of 1985, annual payments termed user fees are collected by the Department of Transportation from the pipeline industry to cover the cost of the Department's pipeline safety program. The fee is based mainly on pipeline mileage rather than on any more precise estimates of the incidence of either costs or benefits. Pipeline Safety User Fees, 51 Fed. Reg. 46,975 (1986).

B. *Application of the "Benefit" Criteria*

1. The Breadth of "Benefit"

Perhaps the greatest disparity among—and often within—agencies investigating the utility of user fees lies in deciding whether a "benefit" is sufficient to support a fee. All agencies require identifiable beneficiaries to assure a fee's propriety.[210] Nevertheless, agencies vary substantially in their willingness to discern the relevant benefit.

The potential for disagreement over the "benefit" issue is perhaps best represented by a dramatic recent shift in position by the Food and Drug Administration ("FDA"). From the very outset of the IOAA, FDA officials opposed the imposition of user charges for new drug approval activity. The agency firmly maintained this position in the face of recurring efforts by the Bureau of the Budget, currently Office of Management and Budget, to induce the agency to enlarge the role for user fees. Throughout this period, the FDA contended that the IOAA did not authorize it to charge fees for activities, such as new drug approvals, governed by the Food, Drug, and Cosmetic Act. The rationale for this position appeared to be threefold. First, the agency was not operating in a field—such as portions of the communications industry—susceptible to natural monopoly. Thus, regulation could not be said to protect the regulatees against competition and against natural monopoly's chaotic consequences. Second, the General Counsel of the agency contended that interpretations of the IOAA, in specifying certain activities for which the FDA could impose charges, impliedly precluded the imposition of fees for other services, even those that might otherwise have been authorized under that legislation.

These two arguments were buttressed by the third, and most basic, contention, namely that FDA activities were intended to protect the general public from impure or ineffective products.[211] As long as the public in general constituted the primary beneficiary of FDA activity under the IOAA, the FDA maintained that no fee could be imposed on regulated companies even for incidental benefits that they might receive from regulation. Instead, any benefits, whether public or incidental, would be funded from tax dollars. The FDA, however, did more than interpret the IOAA. The agency opposed numerous requests, mainly from the Office of Management and Budget, to draft legislation explicitly authorizing the application of user fees to FDA activities.[212]

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[210] *See supra* notes 116-20 and accompanying text.

[211] Thus, a 1983 FDA study on user fees concludes:

> The legislative history of the Food, Drug, and Cosmetic Act leaves little doubt that the American citizenry was intended by Congress as the primary beneficiary and without them [sic] as the primary beneficiary, it is unlikely that Congress would have passed the Food, Drug, and Cosmetic Act of 1938 or its major amendments of 1962.

USER CHARGE STUDY, *supra* note 13, at 40.

[212] *See id.*

The FDA position has undergone substantial metamorphosis. The agency currently subscribes to the broad view that any activity—and review of applications for new drug approvals in particular—performed in order to permit a regulatee to satisfy statutory prerequisites constitutes a sufficient benefit to permit imposition of a user fee under the IOAA. The agency takes the position that its regulation provides a more orderly marketplace for drug manufacturers. Natural monopoly conditions do not exist, so regulation is not needed to avoid the turbulence that arises when multiple producers attempt to occupy a market susceptible to natural monopoly. Rather, the FDA contends that federal regulation increases consumer confidence in the effectiveness of drugs on the market. Public safety, in this view, redounds to the benefit of the manufacturers, as they can more readily convince the public to consume their products. The existence of public benefit, therefore, does not preclude the imposition of fees whenever private benefits materialize that are either "incidental to" or the driving force of public safety regulation.

Indeed, the current FDA view discerns sufficient manufacturer benefit to permit imposing fees for new drug approval applications that are ultimately rejected. The FDA reasons that by rejecting a drug that would have produced adverse effects on consumers, the agency is in fact rescuing the manufacturer from subsequent litigation costs.

If FDA regulation does benefit private firms as the above arguments suggest, then one would anticipate that manufacturers would approve of, or even encourage, such regulation. If fees reflected these benefits, one would expect the manufacturers to be willing to pay for these services up to an amount equal to the benefit received. Nevertheless, drug manufacturers do not uniformly rally to the defense of user fees. Some manufacturers support fees if they will expedite the FDA approval process, but not if fee revenues are offset by cutbacks in agency appropriations. Of course, given a prior history of relatively "free" regulation, it is not surprising that the industry would like to protect the subsidy it has received for any of the benefits that it receives from regulation. Thus, the absence of a movement within the industry in favor of fees is, at best, evidential on the issue of industry benefits.

Even where regulatees do agree to pay fees, their acquiescence does not necessarily reflect the conferral of benefits. For instance, the EPA has encountered some industry support for user fees to be imposed for pesticide re-registration applications. The industry believes that such fees would put pressure on the agency to expedite the re-registration process. These fees, however, are not expected to bear any relationship to the benefits enjoyed by the industry as a result of shorter delays. Nor are they expected to reflect pesticide-specific calculations of costs incurred by EPA in the review process, an alternative means of defining "benefit." Instead, an anticipated re-registration fee of some $150,000 (contained in legislation that ultimately did not pass in the 99th Congress)[213] reflected a compromise reached among the agency, environmental groups, and the industry in an effort to eliminate the re-registration backlog.

The FDA's current conception that regulatees receive a benefit even when a statute mandates agency action is consistent with the dominant definition throughout federal agencies. Certainly the NRC, which received such a broad grant of fee-imposing authority in the Fifth Circuit, subscribes to this theory; so does the EPA. For example, in support of its proposal for IOAA-based registration fees for new pesticides[214] (as distinct from the re-registration legislative issue discussed above), EPA explains the connection between fee and benefit in terms similar to those now embraced by the FDA: "registration is a license that allows the registrant to market a product."[215] The EPA's proposal is fairly narrowly drawn in that the applicant would be charged a fee intended only to defray the costs—direct, indirect and overhead—clearly attributable to processing the type of registration application submitted; fee revenues would amount to about one-quarter of the total costs of the agency's pesticide activities, $18 million out of $67 million, annually.[216] In requesting comment on possible future approaches for collecting post-registration costs, the EPA has indicated that a broader effort may lie ahead. The corresponding concept of benefit to the applicant would be that these other agency activities "allow pesticides to remain on the market."[217]

A rather different consideration arises in a recent FERC rulemaking concerned with electric utility rate filings.[218] The Commission was responding to arguments of utility companies that a user fee should not exceed the benefit—mainly revenue increases—a utility derives from approved rate changes. The Commission believes that, under the IOAA, "fees are properly based on the costs this agency incurs" and not "on the value of the service to the applicant," pointing out that "the IOAA requires agencies to be as self-sustaining as possible.''[219] This position appears compatible with our efficiency criterion, so long as fee payers are under no obligation to apply for a rate change.

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[213] H.R. 2482, 99th Cong., 2d Sess. (1986).

[214] Regulation for the Imposition of Fees for Certain Activities Conducted Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 51 Fed. Reg. 42,974, 42,975 (1986) (to be codified at 40 C.F.R. § 152) (recognizing that pesticide applicants and registrants receive certain benefits from EPA's registration activities, and proposing to implement fees to make the pesticide registration program as self-supporting as possible) (proposed Nov. 26, 1986).

[215] *Id.*

[216] *Id.*

[217] *Id.* at 42,974.

[218] *See* Fees Applicable to Electric Utilities, Cogenerators, and Small Power Producers, 51 Fed. Reg. 35,347, 35,349 (1986) (to be codified at 18 C.F.R. § 381) (clarifying issues raised by the FERC final ruling of Oct. 3, 1986, which established fees under the IOAA for services the FERC provides to electric utilities, cogenerators, and small power producers) (proposed Oct. 3, 1986).

Notwithstanding a broad construction of ''benefit,'' the term should not be employed, and user fees should be avoided, when the payer group receives no demonstrable advantages over the general public in the provision of a particular government service. In such a situation, user fees serve as pure cross-subsidies to the public at large and thereby induce underuse by the payer group of the service. For instance, there recently have been suggestions that the U.S. Travel and Tourism Administration, a federal agency that promotes tourism in the United States, be funded through a ''user fee'' imposed on tickets for international air travel.[220] If the distinct beneficiaries of the agency action are hotels and restaurants that cater to international tourists, and American citizens traveling outside the United States do not occupy those restaurants and hotels, U.S. fee paying citizens would receive no benefit from the service distinct from the benefit to particular business groups or the American public at large. Such a fee therefore would seem particularly inappropriate.

2. The ''Benefits'' of Involuntary Requirements

The benefits received by regulated entities seem more attenuated when the presumed beneficiary ostensibly receives no positive return from compliance with the regulation. Perhaps the starkest example of this form of benefit is an environmental impact statement (''EIS'') requirement that must be satisfied before a number of actions may occur. We take as our example the need to obtain an EIS prior to constructing a pipeline. The EIS provides information of value in determining whether the impact on the environment is sufficiently deleterious to warrant stopping of a proposed project.

It first would appear that the immediate beneficiaries of this requirement are those who live in the area affected by the pipeline. Arguably, the benefits are even broader. If we believe that conservation or preservation of wildlife areas or virgin land likely to be invaded by such a project produces substantial benefit spillovers, then the EIS that protects those interests may constitute a public good typically financed through tax revenues. Indeed, the one group that appears not to receive substantial net benefits from the EIS paid for by the company that seeks the pipeline would appear to be consumers of products that flow from the pipeline, as they ultimately will bear the additional costs for governmental review of environmental impact.

By this line of reasoning, it is difficult to construe the EIS as a benefit on the regulatees who must comply with the requirement. The benefit rather is

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[219] *Id.*

[220] *See* Webb, *One More Dollar for the Road*, Wash. Post, Jan. 19, 1987, at A17, col. 3 (proposing a one dollar fee on every ticket written for trips to and from the United States on airplanes and cruise ships).

to residents of the area where pipeline-caused environmental damage may occur, and broader segments of society that value environmental preservation. Placing a user fee on the pipeline would not represent payment for a beneficial service received by the pipeline owner. This is true whether or not the pipeline can pass along the fee to its customers.

Nevertheless, a broader concept of benefit that takes into account societal risk leads us to quite a different conclusion. Namely, these companies should pay user fees that reflect at least the costs related to governmental review of environmentally suspect projects and, arguably, fees that reflect the expected amount of environmental damage. Under the efficiency rationale for user fees, the primary concern is to ensure that a private activity be undertaken only when its marginal social benefits outweigh its marginal social costs. Presumably the EIS can be helpful in performing that calculus. If the information developed through analysis of the EIS redounds to the benefit of the public at large, the costs incurred in undertaking the analysis should be borne through the tax system. The information, however, is required only because a private firm proposes a project and anticipates a net benefit from it. Moreover, *not* imposing a fee could encourage a larger project (with greater environmental risk) than is efficient. In these cases, there may be a sufficient link between the governmental service and a private benefit to support a user fee.

This same rationale appears to underlie more traditional user fees imposed by local governments. Localities have, with some frequency, conditioned parades or rallies on the payment of fees intended to cover the costs of additional municipal services.[221] Although these services benefit those involved in the public display—for example, by protecting them from hecklers[222]—their primary function appears to be assisting those inconvenienced, either by re-routing traffic, or cleaning up after the event.[223] Thus, the fee collected from those who use the public ways alleviates the costs imposed on the public at large by that use. Although such fees have been struck down as constitutionally impermissible because they interfere with activities protected by the First Amendment,[224] presumably the constitutional issues would not have been reached had the fees been deemed not to confer "benefits" on the payers.

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[221] *See* Neisser, *supra* note 105, at 268 (noting that license fees ranging from $5 to $3000 have been charged with Court approval when the government permits a peaceful assembly, and the amount of the fee relates directly to the actual costs of administering the licensing system).

[222] *Id.* at 334.

[223] *Id.* at 333.

[224] *See* Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1523 (11th Cir. 1985) (holding that city ordinance which requires persons wishing to use city streets and parks for demonstrations to prepay an amount of costs for additional police protection as determined at the discretion of the chief of police violates the first amendment), *cert. denied,* 106 S. Ct. 1637 (1986); Collin v. Smith, 447 F. Supp. 676, 685 (N.D. Ill.) (holding that an ordinance requiring groups of fifty or more persons seeking to parade or assemble in village to obtain liability insurance of at

The approach generally taken by agencies in this situation reaches a similar result but through different reasoning. The Department of the Interior, for example, takes the position that:

> environmental studies that must be performed to grant a permit are an integral part of the permit granting process and bestow a special benefit on the permit recipient; however, the studies also have obvious incidental public benefits. . . . [T]he cost of providing public benefits incident to a private benefit may be recoverable and need not be separated from the private benefit.[225]

More problematic is the issue of whether the user fee should reflect costs related to the actual environmental harm of the project, in addition to the processing costs of determining what that harm will be. Again, efficiency requires that all costs be recognized in deciding whether to undertake the project. Such an internalization process could be ensured by any of three routes. First, victims who suffer adverse effects from the project could be permitted to adjudicate claims against the private company through the tort system. Second, government could perform the cost-benefit calculus and regulate the activity accordingly, for instance through licensing standards. Third, government could impose user fees that reflect the expected environmental harm.

The use of fees in this situation, although administratively complex, would have the advantage of forcing consumers of the project—those who use the products that flow from the pipeline—to pay all of the costs involved with their use. The firm presumably would pass on the cost of fees to its customers, and they, accordingly, would decrease their demand for the relevant products. Fees could then effectively deter individual usage that caused environmental harm in excess of customers' benefits. Additionally, user fees might be superior to litigation in situations where environmental injuries were either diffuse—small injuries to large numbers of victims—or were primarily threatening to future generations.[226] Each of these situations con-

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least $300,000 and property damage insurance of at least $50,000 was unconstitutional), *cert. denied*, 439 U.S. 916 (1978); *see also* Cox v. New Hampshire, 312 U.S. 569, 577-78 (1941) (holding that statute which authorized licensing of parades and established a range of fees was constitutional when the fee was imposed to meet the expenses incidental to the statute's administration and to the maintenance of public order for the licensed event); *cf.* Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943) (holding that municipal ordinance requiring distributors of religious material to pay a flat license fee as a prerequisite to conducting their activities is unconstitutional because it is a tax on the exercise of a privilege granted by the Bill of Rights).

[225] UNITED STATES DEPARTMENT OF THE INTERIOR, DEPARTMENTAL MANUAL, Part 346, § 2.3B, 2.3B(1) (guidelines for identifying recoverable programs).

[226] Where injury is diffuse, the prospect of free riding may deter any victim from instituting legal action. The victim will receive the same benefits (in the form of an

stitutes a practical impediment that discourages victims from bringing litigation. An appropriate internalization of costs would require one of the alternative methods. A conceptual issue does arise in denominating this internalization process as a "benefit" that is appropriate for a user fee. The "benefit" of the fee-induced reduction in pollution initially appears to redound to the benefit of the public that would otherwise be affected. Nevertheless, effluent charges may be explained as fees imposed on activities that use the capacity of natural resources—air and water—to assimilate pollutants.[227]

User fees for applications to engage in activities that generate substantial externalities might also allow "fine tuning" of the regulatory process. An application to enter such an activity typically presents the regulatory agency with a binary choice: it can grant the application or deny it. Any judgment the agency makes about the utility of a proposed project, therefore, is limited to a statement about the existence or absence of net benefits. User fees, however, can be set in amounts that reflect more precisely the relative utility of a project. For instance, the EPA might set fees for PMNs that reflect the relative hazards of an herbicide, thereby encouraging the production of less hazardous and discouraging more hazardous products, notwithstanding that both receive regulatory approval. While similar incentives might be created through the litigation system, where plaintiffs may be able to recover for injury by demonstrating the existence of a less hazardous product, a scale of user fees could build on ex ante informational advantages possessed by private firms rather than ex post information that victims would have to exact during a costly and potentially incomplete litigation discovery process.

In order to achieve our objective of providing incentives for proper levels of the activity, imposition of user fees probably should be conjoined with a bar on individual causes of action for injury caused by the project. A contrary rule would require the private company to pay twice, once through a user fee and once to the victim. A bar on suits against the payer, of course, would require that the subsequent victim either self-insure or bring a claim against a fund that could be financed with the collected fees. The latter route would continue the general tort scheme of matching injurers with victims, but could cause difficulties where harms materialize to a degree greater than anticipated when fees were set and collected. In such a case, however, victims might either bring an action for the excess harm—a potential administrative nightmare if some claimants have already recovered full injuries against the fund when the excess harms materialize—or the government might be permitted to extract additional fees from the company to augment

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injunction), or some benefits (in the form of precedent), while bearing none of the commensurate costs if some other victim initiates the action. The resulting Prisoner's Dilemma likely generates undersupply of litigation arising from diffuse harms. For a general discussion, see C. Gillette & J. Krier, Risk and Hubris (unpublished manuscript on file with authors).

[227] Mushkin & Bird, *supra* note 3, at 19-20.

the now-insufficient fund. Any such scheme would presumably introduce substantial complexity into the litigation and regulation processes. Administrative costs might be so great as to render user fees impractical, notwithstanding that they otherwise would be justified. Even if external costs are not built into user fees, however, exactions may still be warranted in amounts that reflect the government's costs incurred in measuring the amount of external harm that a given project will produce.

An additional problem arises where regulation takes the form of requiring targeted actors to alleviate the negative externality, rather than simply providing information to the government. Assume, for instance, that government imposes on auto owners an obligation to monitor auto emissions by having inspections every 10,000 miles and to pay the inspection costs. While this program may be defended on the theory used for the EIS of avoiding the imposition of external costs, this same result was presumably achieved by the regulatory requirement. Once government regulations optimally control negative spillovers, a user fee adds no efficiency implications. Indeed, because the user fee now becomes superfluous from an efficiency perspective, this situation stands on its head the logic that courts employ to permit more latitude for user fees where the underlying activity is mandatory.[228]

An efficiency case might be available in this situation if the regulation controls externalities suboptimally. If, for instance, the penalty for violating a regulation failed to deter inefficient infractions, the incentive effects of a user fee might close the gap between desirable and actual conduct. But such a justification must explain why the regulation would fail to set the regulatory standard correctly—such as imposing a sub-optimal fine—yet correctly set the user fee. Conceivably, a privileged group could successfully lobby for suboptimal penalties, yet object less strenuously to user fees that did not connote the moral opprobrium of a fine. Short of such an explanation, however, user fees for mandated activities would seem to rest on some justification, such as cost recovery, other than efficient allocation.

3. Identifiable Beneficiaries as Inappropriate Payers

Apart from the difficulty of discerning "benefit," dependence on that criterion to determine the propriety of a fee can be incompatible with the efficiency criterion. "Benefit" to the payer may exist in situations in which imposition of a fee would deter optimal production and may be absent where fees would induce optimal production.

Even where there exist identifiable beneficiaries of a government service, and the good supplied allows the beneficiary exclusive access, application of a user fee may induce underuse from a social perspective. This is likely where there exist low-cost substitutes for the good that do not require payment of a user fee, but that confer fewer external benefits. For instance, the FCC currently is authorized to impose a $6000 fee for hearings. This additional cost can be expected to reduce the expected gains of adjudication before the Commission and thereby increase the number of settlements. In the absence of fees for hearings, parties are more likely to litigate excessively, as they do not internalize all the costs of the procedure. Litigation, however, also produces public benefits in the form of decisions that serve as precedents for future actors.[229] Deterring litigation through additional fees, therefore, does not unambiguously improve allocative efficiency.

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[228] *See supra* text accompanying notes 119-30.

This same concern that fees on beneficiaries' could induce suboptimal behavior has been expressed by representatives of the Department of Transportation in discussions concerning the supply of frequently updated marine and aeronautical maps. If these maps were sold on a full-cost recovery basis, prices would increase substantially. Marginal users of these maps would be less likely to replace them on a regular basis, and would thus fail to obtain the most recent information, primarily safety-related, that these maps contain. Social losses in the form of additional accidents would increase, notwithstanding that they could have been efficiently avoided if decisions were based on marginal benefits and costs to society. Of course, fully rational, self-interested mariners and aviators might recognize that the marginal private benefit of the most recent maps exceed their marginal private cost;[230] but dissonance—a denial of the dangers inherent in an activity—might interfere with an actor's ability to recognize all the costs of an activity in which one has invested substantial resources.[231] In such a case, the additional cost of maps might be viewed as too high to justify replacing the information they already possess. Apart from other social costs associated with additional accidents, underuse of maps is likely to require the expenditure of additional governmental resources for search and rescue of mariners and aviators who become endangered.

The situation is exacerbated where the alternatives to governmental services do not reflect all the costs associated with their use. In these cases, the theory of the second best, garnered from economic analysis, suggests that less safe alternatives will be substituted for safer activities that are relatively expensive.[232] The theory of the second best suggests that if it is not possible to internalize the costs of each activity, it is not necessarily true that all possible costs should be internalized. The theory implies that legal rules predicated on internalization do not necessarily induce efficient behavior. For instance, commentators have argued that imposing strict liability on sellers of defective products may be undesirable if lessors of those products continue to face liability only for negligence, as consumers will substitute potentially riskier leased goods for purchased ones.[233] Another commentator has argued that the tort system as a whole favors older, "private," but more dangerous activities to newer, "public," but safer ones insofar as the system attaches liability only to those who engage in the latter.[234]

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[229] *See, e.g.,* Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249 (1976).

[230] For a survey of psychological constraints on rationality, see D. KAHNEMAN, P. SLOVIC & A. TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982).

[231] *See* Ackerlof & Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 308-09 (1982). Ackerlof and Dickens explain cognitive dissonance as the premise that workers choose to believe a job is safe in order to avoid constant fear or unsettling doubts about how wise it was to take a dangerous job. Under this theory, workers may consequently choose less safe practices, and observe fewer safety precautions.

[232] *See* Lipsey & Lancaster, *The General Theory of the Second Best,* 24 REV. ECON. STUD. 11 (1956).

Second best theory suggests that less costly, more dangerous activities will be undertaken by potential recipients of governmental services who seek to avoid costs related to those services. Assume, for instance, a mariner having difficulty at sea. The mariner has three options for obtaining assistance: self-help; help from other mariners; and help from the Coast Guard. If neither the mariner nor those private individuals in a position to assist are well-trained in rescue efforts, they are likely to be less capable of conducting a successful rescue than the Coast Guard. Nevertheless, if a request for Coast Guard services triggers requests for ex post compensation, while neither of the riskier alternatives requires explicit money payments, endangered mariners may eschew the safer alternative. The result would be less efficient rescues and, arguably, more accidents.

A similar inefficiency may result if government attempts to recover fully the costs associated with generating information useful to the public. Here, again, mapping provides a helpful illustration. The Geological Survey within the Department of the Interior collects information that is subsequently translated into maps that are sold to the public. Map prices, however, reflect only the marginal costs of printing, inventory, and distribution, not the much greater cost of acquiring the information. Considering that government data cannot be copyrighted, any attempt to incorporate data collection expenses into map prices would presumably give private map printers a competitive advantage in map sales. They would be able to purchase a government map, copy it, and sell it at prices that reflected only the marginal printing price.

These possibilities could be avoided if government simply abandoned the map printing business and sold the information to private map makers. But that solution fails to recognize the mixed character of the governmentally supplied good or service. Maps themselves are private goods, the owner of which may exclude others from deriving benefits. But the information on which the map is based has aspects of a public good. Here, again, nonidentifiable beneficiaries exist, and attempting to impose costs solely on the identifiable would induce underuse of the information.

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[233] *See, e.g.,* Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. Pa. L. Rev. 1036 (1980).

[234] *See* Huber, *The Old-New Division in Risk Regulation*, 69 Va. L. Rev. 1025 (1985).

4. Manufacturers as Conduits for Public Beneficiaries

Even if the applicant for a government good or service is not considered the beneficiary of the governmental action, one might still justify imposing a user fee if the applicant is in a position to induce the true beneficiaries to internalize the costs of the products they consume. This may be the case if the applicant against whom the user fee is assessed can pass that cost along to the true beneficiaries. In this way, the latter group will bear both costs and benefits of governmental activities. Assume for instance, that consumers of drugs, rather than drug manufacturers, were considered the true beneficiaries of regulation by the Food and Drug Administration. If the costs of regulation were imposed on the industry and passed on to consumers on a dollar-for-dollar basis, the prices of drugs would reflect the governmental costs of ensuring pure drugs to the consumers. The drug manufacturers would effectively serve as a collection agency for the government. Increased prices would presumably decrease demand for drug products and hence, manufacturer revenues would decline. Nevertheless, this decline would presumably reflect elimination of the free ride that consumers were receiving when the benefits of regulation were subsidized by those who did not use drugs.

Two objections may be raised to this "conduit" argument for imposing fees on regulatees. The first is the public goods argument that we have already discussed. Those who do not use drugs may receive substantial benefits from the presence of pure drugs, such as the relatively quick containment or elimination of contagious diseases. The more nonusers realize the benefits of a service or regulation, the more difficult it becomes to justify imposing user fees on users through an industry conduit. The user fee will always bypass the external beneficiary.

Second, the conduit theory assumes a dollar-for-dollar relationship between costs imposed on the regulatee and the costs passed on to the beneficiary-consumer. The Food and Drug Administration has expressed concern that any user fee imposed on industry would be factored into a pricing process that attached a multiplier along each link in the distribution chain. Thus, if an agency assessed a manufacturer a user fee of $*X*, the manufacturer, seeking a ten percent profit on total costs, might sell the drug to a wholesaler at a price that included 110% of the user fee. By the time the ultimate beneficiary-consumer bought the drug, the retail price would include an amount substantially in excess of the original user fee. This price, one might fear, would artificially depress demand below what would exist if the beneficiary were required to bear only the actual costs of regulation.

Economic theory suggests that this concern probably is overstated. If adding multiples to the costs of regulation would artificially depress demand, one would expect that it would cut enough into sales to depress profits. If that is true, sellers would have no incentive automatically to apply multipliers to their prices. Only where the products at issue have a relatively low elasticity of demand, as may be the case with drugs, will sellers be able to impose multipliers without adversely affecting revenue. Even in that situation, the desire of drug manufacturers to be perceived as furthering public welfare may dampen incentives to capture all the profits available from inelasticity.

5. Benefits of Exclusive Use

In many situations, user fees are collected when an agency decides which of several applicants will be allowed to use a particular scarce resource, such as grazing rights, camping sites in popular recreational areas, airport landing rights, or segments of the broadcast spectrum. The benefit to the successful applicant is obvious, and the cost to the government of making available, maintaining, and allocating the resource may be quite small.

Often comparable resources are available for lease or sale in the private sector, and the commercial value of the resource is not difficult to establish. If the user fee is set high enough to cover only the government's operating costs, all knowledgeable parties who place a commercial value on the resource in excess of government's cost will apply for the resource. Because these applicants may offer to cover no more than the government's costs, it is unlikely that the successful applicant will be the one who values it most highly.[235] This is true to the extent that one is willing to accept market price as the best indicator of economic value and willingness to pay that price as the best indicator of relative ability to use a resource productively.

The most important opportunity cost associated with exclusive use decisions is the denial of access to that unsuccessful applicant who could have made the next best use of the service. That cost is best measured by the amount the unsuccessful applicant would be willing to pay to get the service, as indicated in comparable marketplace transactions or through an auction. Ordinarily, this sum will be larger than the agency's own budgetary outlays on this service or activity, assuming the agency is merely deciding who receives an existing resource. The efficient user fee, to be collected from the successful applicant, should be the larger of the two sums. While unsuccessful applicants for exclusive use also impose costs on the agency, they derive no benefit from the process. If an efficient fee is charged to the successful applicant, there is little advantage in charging others.

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[235] Take, as a hypothetical, a fee of $\$X$ to cover the costs of replenishing and administering federal grazing lands. The commercial value of the grazing lands is $\$(X + Y)$. Farmers A, B, and C apply for use of the lands. A is willing to pay $\$X$, covering only the government's costs. B is willing to pay $\$(X + Y)$. C is willing to pay an amount greater than A but less than B. If the government decides among A, B, and C by pulling a name out of a hat, then there is only a one-in-three chance that B, the most efficient user, will actually get to use them. Similarly, if the government were to distribute the lands on a first-come, first-served basis, B would be precluded from using the lands if either A or C bid first.

It is quite important to distinguish this exclusive use case from the case in which the government is producing a service. For the latter, such as granting a license for a new drug or pesticide, the opportunity cost is, in the main, the value of the agency staff time taken away from other agency business (or newly hired for this purpose) and can be measured properly in terms of actual staff compensation.[236]

C. *Disposition of User Fees*

At first glance, it would appear that efficiency objectives of user fees would be satisfied solely by the imposition of an appropriate charge. The ultimate disposition of a user fee, however, may also affect the efficiency of a user fee program insofar as that disposition creates incentives for agency conduct. These incentives may arise from agencies' desire to expand their budgets or from concern about the agency's relationship with its various clients—Congress, regulated groups, and the public.

Currently, the disposition of user fees varies. Those user fees based on IOAA authority flow into the U.S. Treasury's general fund, to be appropriated in the same way as are taxes and other revenues. Other user fees are earmarked for spending only on the activity generating them. This earmarking can take the form of a dedicated trust fund, aviation and highways, for example, a revolving fund, or a special fund, which differ in various ways, including the extent to which appropriations measures are involved in spending the funds.[237]

Even in earmarking situations, user fees are rarely the sole source of an activity's funding, serving instead either to supplement regularly appropriated funds or to be a partial substitute for such funds. At one extreme, user fee receipts can be offset on a dollar-for-dollar basis by cutbacks in other revenue sources, mainly appropriated tax receipts. In that situation, earmarking may have no practical effect on the level of service an agency provides. Without such offsets, service levels will generally expand and contract with fee receipts. Even then, however, other constraints—such as personnel ceilings—may exist, and annual appropriations actions may still be necessary.

The user fee principles outlined earlier in this article shed some light on the question of how fee receipts ideally should be channeled, and current agency practices offer some interesting contrasts. Recall first that having the recipient pay the opportunity cost of a service is an essential feature of efficient user fees. For then the service will probably be used with the most productive results possible; low priority uses will be discouraged. If the agency determines the nature and amount of service to be offered without regard to fee revenues, user fee disposition itself is simply not an efficiency issue. It is crucial that the proper fee be paid by the consumer, but who receives it is of no significance for efficiency.

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[236] Agency personnel costs are often understated in user fee calculations in that they rarely include the unfunded liability of employee retirement, a significant cost. Letter from David K. Kleinberg, Executive Office of the President, Office of Management and Budget to Jeffrey S. Lubbers, Research Director, Administrative Conference of the United States (Mar. 20, 1987).

[237] *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, INTERIM REPORT OF TASK FORCE ON FEES, § 5, 5-9 (April 1986) (outlining the advantages and disadvantages of general funds, special funds, revolving funds, and trust funds as applied to EPA fee disposition options).

However, if the manner in which user fee receipts are allocated does affect decisions to maintain, increase, or decrease current service levels, user fee disposition will have efficiency consequences. As pointed out earlier, efficiency warrants agency program expansion if consumers are willing to increase usage of efficiently priced services.[238] Were the agency operating as a business, dependent for its continued existence on the adequacy of the fees it receives, disposition of fee revenues would be of great importance for efficiency as well as for program survival. Efficient outcomes over time likely would ensue as fee revenues guided decisions to expand or contract the level of service being provided.

But agencies do not often face the same constraints and incentives as private firms.[239] If the service cannot be expanded or contracted because of policy constraints imposed on program managers—for example, an established policy of no staff expansion—dedicated user fees are not likely to assure efficient responses to changing needs. Moreover, program managers may have objectives that incorporate factors beyond those reflected in fee levels, such as bureaucratic incentives for program growth regardless of fee economics. Finally, even if it were business-like in motivation, the agency may face physical constraints on service expansion such that no additional service would be feasible regardless of funding levels. Then an increase in fee receipts merely represents accumulation of economic rent, payment (but not receipt) of which is essential for efficient outcomes.

An additional point concerning fee receipts is important if the fee covers not only the agency's own costs of providing the service but also external costs—costs borne by society as a whole or by parties inadvertently burdened by actions associated with the government service. Such a fee recoups societal costs beyond those reflected in the agency's budget. The agency then will receive fee revenue in excess of its own service costs. The corresponding surplus over agency costs should not be interpreted as an automatic indication that additional service should be provided. In fact, the agency should not retain that surplus at all, because it represents costs borne by others. It rarely will be administratively practicable to return that excess revenue to the third parties who do bear the burden; normally the prudent course would be to place such receipts in the Treasury's general fund for the appropriation process to allocate.

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[238] *See supra* notes 30-35 and accompanying text.

[239] *See* Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. Rev. 1, 36-40 (1986).

The less bearing that the size of user fee receipts has on decisions to offer more or less service, the less will user fee disposition decisions affect efficiency. Note that the key factor is not the accounting mechanism—whether fees flow into a trust fund or a special fund or the general treasury—but rather the relationship between receipts and decisions about service provision. If there is reason to believe that fees from additional sales will be offset by reductions in other appropriated resources, user fee dedication is more apparent than real.

The effects of disposition are apparent in two recent FDA proposals to collect fees in the approval process for new drugs. The FDA's rulemaking proposal of August 1985[240] envisioned user fees that would flow into the general treasury with no earmarking involved. This choice was dictated by the IOAA, under which the agency was proceeding. But in explaining the logic of the user fee proposal, the FDA added: "[I]n the current period of intense and growing concern about the size of the Federal deficit, failure to invoke currently available law to assess these charges to help reduce the size of the deficit could be viewed as not fully responding to the agency's public trust."[241] Here the law would not permit earmarking user fee receipts, however efficient that might be. Instead the agency defended its proposal in part by embracing another criterion, the one we referred to earlier as revenue enhancement.

The absence of explicit dedication provisions, of course, does not necessarily mean that user fee revenues will have no positive net effects on agency resources. In the annual appropriations process, an agency might prevail in arguing for budget increases reflecting the Treasury's new fee-based revenues. But this result is uncertain, and one firm in opposing the FDA proposal commented that:

> There is no correlation apparent between federal income from the user fees and the future improvement of the [new drug approval] process, because it appears the FDA will derive no benefit from having the fees in place (and indeed will have a net processing cost outflow . . .).[242]

The possible net cost outflow reflects the fact that the agency would incur some administrative costs in any new user fee program even if its budget appropriation does not rise.

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[240] *See* New Drug and Antibiotic Application Review; Proposed User Charge, 50 Fed. Reg. 31,726, 31,726 (1985) (to be codified at 21 C.F.R. § 314) (proposed Aug. 6, 1985) (collection of fees is based on IOAA authority and no other provision for disposition is provided).

[241] *Id.* at 31,728.

[242] Letter from James T. O'Reilly, Legal Division of The Proctor & Gamble Company, to Dockets Management Branch, Food and Drug Administration, 2 (Oct. 18, 1985).

Congress subsequently directed the FDA to cease work on this user fee rulemaking, and the focus has since shifted from the rulemaking setting to the legislative arena. Senator Hatch introduced draft legislation supported by the Administration in August 1986 calling for much the same kind of user fees as the FDA had proposed without success a year earlier. However, the draft bill had a different fee disposition. It specified that fee receipts could be spent only on FDA new drug approval activities. Moreover, Senator Hatch saw the bill as a possible means "of increasing the amount of money devoted to new drug review."[243] Yet the bill provides no assurances that the agency's appropriations from other sources would not be cut in an offsetting manner after user fee receipts begin to materialize.

The two FDA proposals differ sharply on fee disposition, and implicitly on the bearing that fees will have on the FDA service provision. The agency and much of the potential fee-paying industry want expanded service activity, given widespread concern about the slow pace of new drug approvals. Indeed, there appears to be a willingness on the part of many drug companies to pay new fees if this will augment agency resources. For example, the Pharmaceutical Manufacturers Association ("PMA") in April 1986 testimony before the House Appropriations Agriculture Subcommittee stated that: "PMA would support user fees if the fees were reasonable; specifically targeted to improving the drug-approval process; additive to FDA's regular funding, and part of a multi-year commitment to improve the drug-approval process."[244] But without stronger assurances than the Hatch bill contained, there is little industry support for these fees.

The normative basis for dedicated fees in the FDA case is complex. It may be true that current service recipients are cross-subsidized by the general taxpayer, and fees may be warranted to lessen this cross-subsidy even if service levels remain constant—if fee receipts do not augment agency funds. In such a case, a plausible result would be some combination of slightly higher consumer drug prices, lower drug industry profits, and slightly lower incentives to submit drug approval applications. It also may be true that expanded service levels are sufficiently efficient to lessen the delay problem in drug approvals. Dedicated fees that did augment the agency's other resources, rather than being offset, then would serve the useful purpose of expediting the approval process. This in turn would probably moderate the three results just mentioned.

Conceptually, there is some desirable degree of revenue offsetting when a fee program is initiated, as fees come to substitute for tax proceeds in financing the FDA service; but beyond that shift, there may be a strong case for expanded service levels. Insisting that every dollar of new fee revenues be added to existing appropriations is not sound, for it ignores the present pattern of cross-subsidies. This suggests that dedicated fees are warranted but need not be fully additive. The Congressional appropriations oversight and control process then can provide a pragmatic resolution by lessening cross-subsidies and enhancing service levels.

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[243] 132 Cong. Rec. S11436 (daily ed. August 12, 1986) (statement of Senator Hatch) (proposing the user fee as a possible means of bridging the gap in funds due to anticipated Gramm-Rudman-Hollings Act cuts, and as a means of increasing the funds devoted to new drug review).

[244] PMA testimony before House Appropriations Subcommittee, April 1986.

Fee paying groups, however, are often sensitive about the disposition of their fee payments. Potential payers oppose fees that are not used to increase service quantity or quality. We have previously alluded to this phenomenon in discussions between the pharmaceutical industry and the FDA concerning fee proposals. The same concern exists in the airline industry. The eight percent assessment on airline tickets has often been justified on user fee grounds, in that it allegedly covers the costs of aviation capital improvements.[245] Substantial unused balances have arisen in the aviation trust fund however, and until Congress appropriates them for aviation spending, these funds are available for other federal spending programs. They are not segregated from general Treasury funds. The reaction of USAir chairman Edwin I. Colodny is typical: "I think it's quite unfair to tax our users for a system that's supposed to be in the national interest, and then to take the money and spend it for something else."[246]

Any user fee program based on the IOAA, of course, channels all receipts to the Treasury general fund, and the majority of agencies with which we have consulted favor such fee disposition practices. For instance, the Federal Communications Commission expressed concern that any link between its user fees and revenues would complicate financial relations with its major client groups, Congress, and the communications industry. Congress might be reluctant to grant budgetary increases if the agency could become self-sufficient through fees. The industry might subsequently suspect that fees reflected agency budgetary needs rather than costs of regulation, much as drivers might suspect fines imposed by judges whose salaries depend on such collections.[247]

Nuclear Regulatory Commission staff were similarly concerned that if fees were retained by individual agencies, fluctuations in agency receipts could wreak havoc with internal budgets. This objection is more telling in an agency like the NRC, which has fewer clients to regulate and whose activities may be sporadic, than in an agency with a large industry base and a more regular pattern of fee-generating activities.

If the dedication of fee receipts makes sense in other respects, however, problems of fluctuating receipts could be resolved while still preserving the fee dedication feature. Fee receipts could be made available for agency use with a one or even two year lag, so that revenue surges or declines would occur early enough to allow an agency to implement corrective action in the form of either adjustments in fee levels or agency service levels, or requests for supplemental appropriations. Alternatively, a multi-year averaging arrangement could be established, with the amount of fee proceeds made available in any given year being the average annual receipts for the prior, say, three years, possibly with a trend factor built into the calculations.

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[245] *See, e.g.*, UNITED STATES GENERAL ACCOUNTING OFFICE, AVIATION FUNDING: OPTIONS AVAILABLE FOR REDUCING THE AVIATION TRUST FUND BALANCE (May 1986).

[246] *Delays in Air Travel*, Wash. Post, Nov. 8, 1986, A8, col. 4.

[247] *See* Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

Nuclear Regulatory Commission staff noted a more pervasive concern about fee disposition—retention of fees would not inure to the benefit of the individual agencies if Congress cut the agency budget in a proportionate amount. Under this scenario, retention of fees is anticipated to carry little additional benefit and substantial internal cost if for no other reason than the additional accounting effort required. While some agencies have mentioned the additional political capital garnered by demonstrating that the agency has been responsible for additional federal revenues, the same point can be made where the collector does not retain possession of the fee collected. Yet, we have learned at FDA and elsewhere as well that fee retention is expected by some to result in augmentation of resources otherwise available. Indeed, the EPA favors legislative action to permit dedication of receipts from specific EPA fees collected under IOAA authority.

Little if any of the argument we have heard for or against retention of fees is based on concern for allocative efficiency. Nor is this argument rooted in alternative conceptions of fairness that might be used to trump an efficient allocation of society's resources. Rather, each argument presented emerges from a conception of what would maximize an agency's budget or minimize difficulties it otherwise might encounter with a client group. Consequently, if allocative efficiency is an appropriate goal for the imposition of user fees, proper resolution of the fee disposition issue should be addressed through a broader forum than the agency itself is likely to provide. Endogenous designs can be expected to reflect agency self-interest rather than socially optimal outcomes.[248]

One development that bears on these points is underway at the Customs Service. The Fiscal 1987 Omnibus Budget Reconciliation Act of 1986 in calling for a new fee of 0.22 percent on the value of commercial imports, authorized an advisory committee with members drawn from both the private and public sectors to scrutinize the fee's implementation.[249] It also calls for a novel type of fee disposition, involving a trust fund with a new wrinkle. While receipts are dedicated to funding Customs inspection services, the latter are subject to normal budgetary controls exerted by OMB and the appropriations process, and the fee collected will be adjusted biennially to avoid surpluses or deficits. While elsewhere we have expressed doubts about the economic logic of terming this particular measure a user fee as distinct from a tax,[250] two of its provisions—the advisory committee and the disposition mechanism—appear promising. But whether the advisory committee will have the kind of membership that can usefully broaden the agency's perspective remains to be seen.

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[248] This is not to say either that parochial bureaucratic interests always adversely affect user fee decisions or that Congress can be counted on to ensure efficient user fees. Public rulemaking proceedings at agencies may offset inherent parochialism if a broad array of interests are represented. Moreover, agencies generally are better equipped than Congress to deal with the technical complexities of fee design and implementation.

[249] Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 8101, 100 Stat. 1874, 1965-67 (1986) (to be codified at 19 U.S.C. § 1202); *see* Ad Valorem User

D. *Political Considerations*

The final element that may skew user fee levels and applications is the effect of political considerations on the assessment of fees. Political considerations may emerge in either the legislative or administrative area. Legislatures may fail to authorize fees that would further allocative, fairness, or revenue enhancement goals, while administrators charged with setting specific fees may similarly fail in the implementation process. To the extent that either of these "failures" results from robust, deliberative debate in which those favoring and opposing a particular fee are represented and decisions are predicated on an informed view of the public interest, it is difficult to speak of a failure of the process at all. Indeed, a political decision not to impose a fee after a hearing involving all sides of the issue may be evidence that even an efficient fee had been trumped by considerations of fairness. Such an event, for instance, may account for a rapid turnaround concerning fees in the late 1940s. According to the Senate Report on the IOAA, after Congress provided for transferring the cost of meat inspection services from the federal government to the industry there arose a "furor . . . so violent that before the fiscal year had expired, the Congress . . . passed Public Law 610, providing that thereafter all meat-inspection costs should be borne by the Federal Government."[251] The Report concluded that "[t]his instance is an excellent example of a service rendered by the Government for the good of all the people . . . ."[252]

Our concern for political skews, however, assumes that decisions to impose fees depend on factors other than the public interest. Contemporary theories of administrative law suggest that regulation is susceptible to general problems of collective action. Regulation itself constitutes a public

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Fee, 51 Fed. Reg. 43,188, 43,189 (1986) (to be codified at 19 C.F.R. § 24) (interim regulations Dec. 1, 1986) (allowing U.S. Customs Service to assess a .22% fee on commercial imports).

[250] *See supra* text accompanying note 195.

[251] SENATE REPORT, *supra* note 117, at 5.

[252] *Id.*

good, in that those who would benefit will not be adversely affected if they fail to contribute to the cost of government intervention.[253] Instead, they can free ride off the efforts of others. Only those whose personal benefits would exceed the substantial costs of influencing government, therefore, can be expected to take action to advance their interests. Since few members of the public at large will satisfy this criterion, regulation originally intended to serve the public interest actually comes to serve the private interests of regulatees.[254] These regulatees have an interest in petitioning or lobbying regulators, as the personal benefits of obtaining favorable regulation are substantial. Simultaneously, these firms' costs of lobbying are relatively small, as industries are capable of forming trade associations or other systematic contacts with administrators that reduce per capita expenditures. Regulated groups may also avoid tendencies for free riding with relative ease. If the group is small, monitoring the contributions of others and inflicting reputational damage on free riders may have significant incentive effects on inducing contributions. Even where a regulated industry is composed of substantial numbers of members, free riding may be minimized where lobbying is performed through a trade association financed by those members, as long as the total benefits of association membership—for example, opportunities to make business contacts, exchange information—are sufficient to attract a large percentage of the industry.[255] The effect of the resulting one-sided lobbying is exacerbated if we relax the assumption that regulators are themselves publicly interested. Contemporary theories of administrative law dismiss as naive any suggestion that much administrative behavior can be explained by reference to public-spirited altruists. Instead, these theories suggest that administrators seek to maximize self-interested goals of wealth, power, or opportunities for advancement that might deviate substantially from public interest.[256]

These theories of administrative behavior hold substantial consequences for the optimal application of user fees. The beneficiaries of fees—those who would otherwise subsidize government activities from which they get little benefit—are diffuse: they constitute the majority of taxpayers. Further, the cost of not having user fees, while substantial in the aggregate, is likely quite small for any individual. Thus, few individuals can be expected to appear before legislators or bureaucrats in favor of fees. Those adversely affected by fees—those who currently free ride on subsidies—are often represented by trade associations with ready access to decisionmakers. In addition, they have substantial incentives to take advantage of their access, since the imposition of fees would significantly increase their costs, notwithstanding their ability to pass some of those costs along.

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[253] D. Parfit, Reasons and Persons, 64 (1984); Gillette & Krier, *The Un-Easy Case for Technological Optimism*, 84 Mich. L. Rev. 405, 417-26 (1985).

[254] *Cf.* Peltzman, *Toward a More General Theory of Regulation*, 19 J. Law & Econ. 211, 212-13, 231 (1976) (describing a political auction in which the highest bidder receives the right to tax the wealth of everyone else); Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. 3 (1971) (arguing that every industry or occupation that has enough political power to influence government policy will seek to do so).

[255] *See* R. Hardin, *supra* note 138, at 31-35 (discussion of the by-product theory).

[256] *See, e.g.*, Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65, 101-02 (1983) (interpreting contemporary theories as suggesting that administrators, although they may enjoy promoting "the public good," pursue actions motivated by "a mix of selfish desires and idiosyncratic notions of social welfare" which only incidentally correspond with social optimization).

Taken in isolation, this paradigm suggests that those whose interests favor user fees will fail to be represented while those whose interests oppose user fees will gain access to decisionmakers. The result, suggested by an interest group or faction theory of politics, is that user fees would be not be imposed in all circumstances where they are appropriate. But the effects of interest groups are not unidirectional. Bureaucrats similarly form an interest group. Substantial scholarship in administrative law suggests that bureaucrats attempt to maximize their own budgets.[257] Those agencies entitled to supplement their budgets from user fees, therefore, would have an interest in oversupplying user fees. Even an agency dependent on Congressional appropriations might wish to maximize revenue from fees in order to convince budget officials that they should increase the agency's budget. On the other hand, agency concerns that it would have to absorb the administrative costs of the collections while retaining none of the fee receipts would dampen agency enthusiasm for user fees.

Another aspect of this political dimension entails federalism issues. State and local governments are very sensitive to implications that the federal user fee debate may have for their independence and fiscal responsibilities. Federal fees can affect the political and economic climates surrounding state and local fee collections, indirectly influencing the fiscal capabilities of those governments. These concerns are especially important in program areas such as environmental protection and transportation where extensive and complex interaction exists between federal and state governmental units. The April 1986 report of the Environmental Protection Agency Task Force on Fees examines state reaction to federal user fee initiatives. It finds that states are supportive of user fees of their own design but quite leery of any imposed on them by the federal government. States already collect some fees, and they can be expected to resist policies imposed on them, especially when those policies require alteration of existing practices. States want to be substantively involved in developing user fee systems, in part because of concern about administrative and enforcement problems they could face.

The federal government already has delegated many environmental duties to states in areas such as air and water protection, and wants to further delegate its permit granting program responsibilities. The EPA has mixed incentives as to user fees in areas that are delegable to states. From a staff perspective, the task of devising federal user fees, even without state involvement, is not easy and would have limited payoff, assuming further delegation results in states gradually taking over the fee systems and revenues. Thus once the need for federal-state coordination is factored into the situation, it is hardly surprising that little headway has resulted in developing user fees in delegable program areas. Yet at the same time that bureaucratic incentives and coordination problems impede progress, there appears to be much underlying support for the user fee concept. Despite state misgivings about a system of national fees, the EPA reports that: "[g]overnments at both the Federal and State levels are serious about the idea of passing on either some or all of the costs of environmental protection to those entities contributing most directly to environmental pollution or to the cost of administering the law."[258]

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[257] *See, e.g.*, W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 45-52 (1971).

In the transportation sector, numerous political considerations, some related to federalism and others to interest group effectiveness, have shaped user fee systems. While user fee revenues in transportation are quite large relative to most fee programs, they do not come close to covering agency costs of providing the corresponding services and are in general suboptimal from an efficiency perspective.[259] In fiscal year 1984, combining federal, state, and local government data, user revenues amounted to just under 65 percent of the government's expenditures on transportation.[260] Moreover, this figure masks much diversity across particular transportation modes: user revenues as a percentage of governmental expenditures, by mode, that year were:

Type of Public Transportation	*User Revenues as Percentage of Government Expenditures*
highways	78
air	77
water	35
transit	29

IV. CONCLUSION

As we noted at the outset, federal user fees may be instituted to achieve various goals, including distributional equity or fairness, revenue enhancement, and privatization. Our focus, however, has been on allocative efficiency as the presumptive criterion for the desirability, amount, and disposition of any given user fee. Our review of diverse agency experience with user fees leads us to conclude that suitably structured fees can aid agencies in better managing service usage and recovering costs from service recipients. For this to occur, however, attention to various considerations is essential.

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[258] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, INTERIM REPORT OF TASK FORCE ON FEES 3-4 (1986).

[259] *See* J. GOMEZ-IBANEZ & M. O'KEEFE, THE BENEFITS FROM IMPROVED INVESTMENT RULES: A CASE STUDY OF THE INTERSTATE HIGHWAY SYSTEM 10-12 (1985).

[260] UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL STATE AND LOCAL TRANSPORTATION FINANCIAL STATISTICS FISCAL YEARS 1977-1984 10 (May 1986).

First, a user fee should be collected only when a government-provided good or service either creates an identifiable benefit for the payer or its customers, or lessens a burden the fee payer imposes on others. Second, the amount of the fee collected from the recipient of the good or service should equal the opportunity cost of its provision. Measuring this standard depends on the type of good or service involved. Where exclusive use or access to scarce resources is being granted, as with aircraft landing rights at congested airports, auctions can establish the pertinent value. Where the service substitutes for privately marketed services, as with grazing rights and delivery services, market value pricing based on data from private markets will be appropriate, unless such prices are artificially supported. For the more commonly encountered types of government services like inspections and application processing, opportunity costs amount to those agency outlays attributable to the increment of service being provided. As a rule, previously incurred capital costs or other sunk costs should not be recouped through fees for current services. However, fees should cover any anticipated capital replacement or repair costs related to the ongoing provision of the good or service.

Where provision of the good or service creates substantial external benefits, user fees should be reduced to reflect judgments about the relative magnitudes of the marginal social benefits entailed. Similarly, where provision imposes substantial external costs, fees should be increased accordingly. In the event of external effects, the following principles should apply:

1. The fee level normally should be set without regard to whether the fee payer is itself the beneficiary of the government good or service or whether it distributes those benefits to its customers or employees. However, selection of the point of collection should take into account the costs of administration.
2. Where external benefits exist, that is, where uninvolved third parties can be shown to benefit significantly from a governmental good or service, user fees should not be expected to recover fully the cost of providing that service. Nor should user fees imposed on the recipients of one of an agency's services subsidize other services. Thus, user fee schedules for a particular government good or service should not be predicated on a percentage of an agency's budget unless there is a realistic expectation that a fee established in this manner will approximate the actual cost or benefit related to that good or service, as derived from the foregoing standards. Similarly, agencies should not collect fees

based on a percentage of their budget, unless that percentage reflects the opportunity costs of services provided to fee payers.

3. A primary objective of the governmental service may be to lessen the risk or burden that a commercial activity imposes on third parties (e.g., safety inspections and pesticide approvals). In such cases, the user fee normally should not be less than the agency's full costs; indeed, if suitable data exist, the user fee should reflect the (presumably higher) marginal social cost of the risk or burden at issue.

4. The proportion of service costs to be recovered by user fees as opposed to alternative financing mechanisms should be determined by taking into account (i) the practicability of allocating costs between fee payers and third party beneficiaries, (ii) potential adverse effects on agency program goals caused by fees that are unduly high with respect to fee payers, and (iii) the relative advantages and disadvantages of alternative financing mechanisms.

Three further conclusions reflect the fact that objectives other than allocative efficiency play an important role in the use of fees. User fee receipts ordinarily should not be earmarked, but should flow into the general treasury to facilitate overall budgetary allocations that are responsive to the public interest as manifested through the political process. Additionally, other criteria—such as program goals and fairness—may influence the setting of fees or granting of waivers or reduction in fees. For instance, a concern for multiple points of view on the airwaves might justify departure from pure auctions for FCC licenses. Since allocative efficiency is the presumptive goal of fees, however, in such cases the agency should provide a statement of its reasons for departing from allocative efficiency principles in structuring its fees. Finally, a material boost toward implementation of the foregoing principles might result from creation of a user fee information center to monitor all aspects of agency fee administration and to serve as a clearinghouse for data on user fee practices. Such a center, located within the Office of Management and Budget or the General Accounting Office, could also identify specific statutory or other impediments to more efficient user fee design.

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-5

THE CONSTITUTIONALITY OF ARBITRATION IN FEDERAL PROGRAMS

by

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May 27, 1987

Our "administrative state" evolved in order to shift decisionmaking from the constitutional branches to administrative agencies, which were to apply expert judgment through speedy and informal procedures.[1] Recently, however, increasing formality has beset the administrative process.[2] Consequently, agencies have begun experimenting with Alternative Dispute Resolution (ADR) procedures,[3] which employ private parties to resolve issues that are related to federal programs and that otherwise would be decided by executive officers or the courts.

This development reveals a third model for public decisionmaking, supplementing the traditional ones of decision by the constitutional branches themselves and delegation to agencies under the procedures of the Administrative Procedure Act[4] or other applicable statutes. Today, the legitimacy of the administrative state is generally thought to rest on the nature and strength of the relationships between the agencies and the constitutional branches.[5] Accordingly, concerns have arisen that ties to the constitutional branches become overly attenuated when private parties are authorized to determine or to apply public policies.[6]

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[1] See generally Rabin, Federal Regulation in Historical Perspective, 38 Stan. L.Rev. 1189 (1986).

[2] ABA Comm. on Law and the Economy, Federal Regulation: Roads to Reform, Ch. 6 (1979); 4 Senate Comm. on Government Operations, Study on Federal Regulation, Delay in the Regulatory Process (1977).

[3] For a general overview of these procedures, see S. Goldberg, E. Green & F. Sander, Dispute Resolution (1985).

[4] 5 U.S.C. § 551 et seq.

[5] Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).

[6] The Department of Justice has expressed concerns that the use of ADR techniques might violate the delegation doctrine, or might infringe the President's responsibilities to control execution. Office of Legal Counsel, Memorandum for Stephen J. Markman Re:

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In a series of recommendations, the Administrative Conference of the United States has urged the use of ADR techniques in federal programs.[7] Most ADR procedures present no serious constitutional issues because they leave final authority with government officers, although private parties influence the agency's decision. Examples include negotiated rulemaking[8] and mediation to aid settling litigation.[9] These procedures do not differ sharply enough from other avenues for private influence on public policymaking to justify constitutional distinctions, as I will explain. Alone among the recommended procedures, arbitration delegates decisionmaking to private individuals, with quite limited review by the government.[10]

Existing law authorizes agencies to employ arbitration in a variety of contexts, which comprise three broad categories for purposes of analysis. The first is money claims by or against the government. For example, claims of Medicare beneficiaries for reimbursement of certain medical expenses are arbitrated by private insurance carriers.[11] The second is disputes between the government and its employees, including both grievances under existing law or contract[12] and the

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[6] Administrative Conference Recommendation on Federal Agencies' Use of Alternative Dispute Resolution Techniques, April 24, 1986. I discuss these issues in parts I and II infra. The Department has, however, recently advocated the use of arbitration to resolve fair housing disputes. Statement of Asst. Attorney General Reynolds Before the Subcommittee on Constitution, U.S. Senate Committee on the Judiciary, April 7, 1987.

[7] See generally 1 CFR § 305.86-3.

[8] Negotiated rulemaking consists of agency-sponsored negotiation among groups interested in a contemplated regulation. The process generates a proposal which the

(Continued on page 3)

[9] 1 CFR § 305.86-3. See also id. §.84-4.

[10] 1 CFR § 305.86-3.

[11] 42 U.S.C. § 1395u(b)(3)(C); 42 CFR § 405.801-.872.

[12] See generally Comment, Federal Sector Arbitration Under the Civil Service Reform Act of 1978, 17 U. San Diego L. Rev. 857 (1980).

determination of future contractual relations.[13] The third is disputes between private parties that are related to program administration. Examples include claims against the "Superfund" for cleanup of toxic wastes,[14] the ascertainment of employers' liability for withdrawal from pension plans that are overseen by the Pension Benefit Guaranty Corporation,[15] and the determination of compensation that a pesticide manufacturer must pay for the use of another's data in obtaining federal registration.[16]

My purpose here is to analyze the constitutional issues surrounding these arbitral schemes, and to suggest ways to structure them to minimize constitutional concerns.[17] The constitutional issues take several forms. First, does article I forbid Congress to delegate government functions to private

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[8] agency issues as a notice of proposed rulemaking, initiating the usual procedure for informal rulemaking. See 1 CFR § 305.82-4 and -.85-5; see generally Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982).

[13] 5 U.S.C § 7119; 39 U.S.C. § 1207; see generally Craver, The Judicial Enforcement of Public Sector Interest Arbitration, 21 B.C. L. Rev. 557 (1980).

[14] 42 U.S.C. § 9612(b)(4); 40 CFR § 305.10-.52.

[15] 29 U.S.C. § 1381; 29 CFR § 2641.1-.13.

[16] 7 U.S.C. § 136a(c)(1)(D)(ii); 29 CFR § 1440.1.

[17] Concerns may also arise that there be statutory authority for agencies to refer matters to arbitration. The Comptroller General has sometimes been reluctant to find statutory authority for government arbitration. See generally Behre, Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?, 16 Pub. Contract L.J. 66 (1986). Much of the analysis here, seeking controls on arbitration sufficient to meet constitutional concerns, identifies characteristics of arbitration schemes that may also alleviate concerns about their consistency with statutory authority, because principles of fairness and accountability to executive authority are pertinent to both inquiries. The discussion that follows assumes the presence of adequate statutory authority for any particular referral to arbitration.

deciders? Second, is arbitration consistent with article II's grant of executive power to the President? Third, is it consistent with article III's grant of judicial power to the federal courts? Fourth, if these structural concerns are satisfied, are there assurances of due process?

I. A FRAME OF REFERENCE: PUBLIC PROGRAMS, PRIVATE POWER.

A. The Nature of Arbitration.

Arbitration, which was known to the common law, has always been employed in America for the resolution of some disputes.[18] In modern times, it has gained widespread use in labor relations and commercial practice.[19] Arbitral schemes seek to produce speedy and final decisions at low cost.[20] Accordingly, they share certain general characteristics, although their details vary substantially. The arbitrator, a private individual with no personal interest in the dispute, is often selected by the parties, sometimes with reference to expertise in the subject matter. Such organizations as the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS) maintain rosters of arbitrators and promulgate codes of ethics and procedure.[21] The standard for decision may be a contract provision or a specified body of law. Procedure is informal, with limited discovery and relaxed evidentiary strictures. The outcome is an award, perhaps accompanied by a brief recitation of the underlying facts and conclusions.

The courts have developed a special relationship with arbitration. Until this century, hostile common law courts lent it little or no aid.[22] The courts distrusted the reliability of arbitral process and perceived a threat to their own jurisdiction.[23] Today, courts are more hospitable to an alternative forum that reduces large caseloads. Also, legislatures have endorsed arbitration and have defined its relation to the courts. The U.S. Arbitration Act[24] and its analogues in most states[25] authorize courts to enforce arbitration agreements and to review awards on very limited grounds (such as the corruption of the arbitrator and the consistency of the award with the arbitrator's authority). Modern cases often emphasize the need to honor contracts. For example, in Dean Witter Reynolds, Inc. v. Byrd,[26] the Supreme Court held that the Arbitration Act required enforcement of an agreement to arbitrate a securities dispute, although the consequence was to sever pendent claims from a suit properly in federal court. The Court thought that some potential inefficiency was a tolerable price to pay for the benefits of enforcing contracts.

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[18] See generally Mann, The Formalization of Informal Law: Arbitration Before the American Revolution, 59 N.Y.U. L.Rev. 443 (1984).

[19] In 1984, nearly 40,000 labor, commercial, construction, and accident cases were filed with the American Arbitration Association. Meyerowitz, The Arbitration Alternative, 71 A.B.A.J. 78, 79 (1985).

[20] See generally S. Goldberg, E. Green & F. Sander, supra note 3, at 189-243.

[21] See, e.g., American Arbitration Association Commercial Arbitration Rules, in R. Coulson, Business Arbitration--What You Need to Know 33-40 (3d ed. 1986); Code of Ethics for Arbitrators in Commercial Disputes, id. 141-49.

Judicial deference to arbitration has important limits, however. First, courts do not allow arbitrators to determine their own jurisdiction. Under the Arbitration Act, that function is for the courts,[27] which resolve doubts in favor

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[22] See Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132, 138 (1934).

[23] Kanowitz, Alternative Dispute Resolution and the Public Interest: The Arbitration Experience, 38 Hast. L.J. 239, 251-55 (1987). As Justice Story put it:

> arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. . . . They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is

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[24] 9 U.S.C. §§ 1-14 (1982).

[25] These are usually based on the Uniform Arbitration Act, 7 U.L.A. 5 (1985).

[26] 470 U.S. 213 (1985).

[27] See, e.g., AT &T Technologies, Inc. v. Communications Workers of America, 106 S.Ct. 1415 (1986).

of arbitrability.[28] Second, the Supreme Court has held that certain statutes confer nonwaivable rights to federal court enforcement. For example, in Alexander v. Gardner-Denver Co.,[29] the Court held that a collective-bargaining agreement to arbitrate discrimination charges did not foreclose resort to a Title VII suit. Third, the preclusive effect of arbitration on later lawsuits is often either unclear or nonexistent.[30]

B. Delegation to Private Parties in American Law.

Questions about the permissibility of placing governmental power in private hands occur throughout American law.[31] Unfortunately, analysis of "delegation to private parties" is hampered by a tendency of courts, confronting particular aspects of the phenomenon, to make broad statements that are inconsistent with both theory and practice in related contexts. Therefore, to provide a frame of reference for analysis in the context of administrative adjudication, I briefly review the major cases and survey the public/private distinction in American law.

1. The Supreme Court Cases.

The Supreme Court has sometimes considered the permissibility of delegations to private parties. The most prominent case is Carter v. Carter Coal Co.,[32] in which the

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[23] but rusticum judicium.
Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845)(No. 14,065).

[28] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983).

[29] 415 U.S. 36 (1974).

[30] See generally Carlisle, Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?, 55 Fordham L. Rev. 63 (1986); see McDonald

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[31] For an able, comprehensive review, see Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L. J. 650 (1975).

[32] 298 U.S. 238 (1936).

Court invalidated a federal statute that allowed a majority of miners and the producers of two-thirds of the annual tonnage of coal to set maximum hours and minimum wages for the industry:[33]

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interest of others in the same business.

The Court stated an absolute principle condemning delegations to interested private deciders to regulate others: "in the very nature of things, one person may not be entrusted with the power to regulate the business of another,--and especially that of a competitor." Although its rhetoric suggested reliance on the delegation doctrine, the Court held that the statute denied due process.

The Court had earlier suggested the delegation doctrine basis, in A.L.A. Schechter Poultry Corp. v. United States.[34] While overturning the National Industrial Recovery Act's authorization to the President to approve codes of fair competition generated by industry, the Court asked:[35]

> But would it be seriously contended that Congress could delegate its legislative authority to trade . . . groups so as to empower them to enact the laws they deem to be wise and beneficent for . . . their trade or industries? . . . Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The Schechter Court stressed the breadth of the field within which the President and the code drafters could roam, rather than the potential for interested private decisions to be rubber-stamped by harried bureaucrats-- although the Court was

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[30] v. City of West Branch, 104 S.Ct. 1799 (1984) (unappealed arbitration does not preclude civil rights litigation).

[33] 298 U.S. at 311.

[34] 295 U.S. 495 (1935).

[35] 295 U.S. at 537.

well aware that the administration of the NIRA posed the latter problems.[36]

Notwithstanding the New Deal Court's confident dicta, the path of the case law has wavered. In some earlier cases, the Court had struck down land use regulations authorizing groups of propertyowners to control some uses of their neighbors' property.[37] Yet the Court has repeatedly upheld delegations to interested private decisionmakers.[38] Distinctions offered to explain the inconsistencies have been thin to the vanishing point (for example, that a restriction is being relieved rather than imposed). There is little profit in reviewing these cases here.[39] It is enough to say that delegations to private deciders are in jeopardy if the decider has an interest in the outcome. To see why there is no broader rule that all private delegations are unconstitutional,[40] it is necessary to widen our inquiry.

2. The Public/Private Distinction.

The boundary of the public sector in American life has never been distinct.[41] Many "private law" arrangements bind

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[36] See L. Jaffe, Judicial Control of Administrative Action 61-62 (1965).

[37] Eubank v. City of Richmond, 226 U.S. 137 (1912); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

[38] E.g., Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Currin v. Wallace, 306 U.S. 1. 15-16 (1939); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577-78 (1939).

[39] See generally Liebmann, supra note 31; Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201 (1937).

[40] Recent state cases considering the validity of private delegations have often involved public employee interest arbitration. Most courts have upheld these schemes against delegation attacks, see Craver, supra note 13. For example, see City of Richfield v. International Firefighters Ass'n., 272 N.W.2d 42 (Minn. 1979); Wyoming v. City of Laramie, 437 P.2d 295 (Wyo. 1968). Cases

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[41] See generally Symposium, The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982).

persons not consenting to them. Ancient doctrines of property and contract allow private persons to make law, for example by imposing restrictive covenants on land.[42] Similarly, private groups are often authorized to exert coercive powers over others. One prominent example is the collective-bargaining agreement, by which a majority of workers in a bargaining unit select a representative who may bind them all.[43] Another is the formation of local governments by petition of some residents in a territory, against the wishes of the others.[44]

Formally private action sometimes becomes legally public for some purposes. Thus, we struggle to define the kinds of relationships between private institutions and the state that suffice for "state action" and the invocation of constitutional restrictions. The Supreme Court has recently been unwilling to characterize private activity as state action notwithstanding substantial public financial support and close regulation; instead, the Court looks for direct coercion or encouragement of the particular decision in question.[45]

Per contra, formally public action sometimes has dominant private aspects. Statutes sometimes authorize agencies to transform private industry standards into government regulations.[46] And federal judges enforce consent

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[40] invalidating such schemes include Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786 (Utah 1977); Greely Police Union v. Greely City Council, 191 Colo. 419, 553 P.2d 790 (1976).

[42] The classic exposition of this point is by Jaffe, *supra* note 39.

[43] *See*, *e.g.*, Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943) (under Railway Labor Act, majority of workers choose a representative; Board resolves disputes without judicial review).

[44] *See generally* Liebmann, *supra* note 31, at 672-75.

[45] *See*, *e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[46] R. Dixon, Standards Development in the Private Sector (1978); Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329 (1978).

agreements in public law litigation, as negotiated by private parties.[47]

A number of modern institutions are public/private hybrids. These often take the form of government corporations, such as the Tennessee Valley Authority, the Postal Service, or Amtrak.[48] The most important of these hybrids is the Federal Open Market Committee (FOMC), which forms and executes the nation's monetary policy.[49] The FOMC consists of the seven members of the Board of Governors of the Federal Reserve System, who are government officers, and five private bankers.

In Melcher v. Federal Open Market Committee,[50] a district court upheld the constitutionality of the FOMC. The court noted that the private members do not have the "decisive voice" in policymaking, because the Board of Governors holds a majority. The court also distinguished the coercive functions of government from monetary policymaking, which is executed through private market transactions.[51] Conceding the importance of monetary policy to the nation's economy, the court observed that many private institutions also have great impact. Finally, it relied partly on tradition-- monetary policy has been committed to a combination of public and private decisionmakers since the days of the Bank of the United States.[52]

Melcher is symptomatic of our lack of any satisfactory normative or positive theories of the public/private boundary.[53] Plainly, an a priori constitutional principle condemning private delegations would require wholesale rearrangements in our law and institutions. Nevertheless, some delegations are more justifiable than others-- the concerns expressed in the cases have substance. For now, we must content ourselves with the articulation of principles and controls in particular contexts, aided by the broader perspective.

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[47] Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).

[48] Tierney, Government Corporations and Managing the Public's Business, 99 Pol. Sci. Q. 73 (1984).

[49] See generally W. Melton, Inside The Fed, Making Monetary Policy Ch. 2 (1985).

[50] 644 F.Supp. 510 (D.D.C. 1986).

[51] 644 F.Supp. at 523 n. 26.

[52] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), which upheld the constitutionality of the Second Bank, did not discuss problems of private delegation.

[53] This note is sounded throughout the Symposium, supra note 41.

C. Delegation of Adjudicative Power in Administrative Law.

The constitutionality of delegating adjudicative power to administrative agencies was established by Crowell v. Benson.[54] The context was a worker's compensation scheme for longshoremen. Congress had authorized an agency to decide claims under adjudicative procedures resembling those later codified in the Administrative Procedure Act (APA).[55] (An examiner was to conduct informal evidentiary hearings on a record.) The Court rejected a due process assault on administrative factfinding, because judicial review could assure the presence of substantial evidence for the award. Nor did article III require that the subject matter, which was within the federal judicial power, be allocated to the courts. It sufficed that reviewing courts retained power to decide issues of law. The Court did hold, however, that courts must perform independent review of issues of constitutional or jurisdictional fact going to the power of the agency in the premises, such as whether an accident had occurred on the navigable waters.

Although Crowell set the stage for modern administrative adjudication, much has happened since. First, the two limitations that the Court relied on to justify shifting article III business to agencies have eroded. Courts now defer to agency determinations of law as well as fact,[56] and the doctrines of constitutional and jurisdictional fact have fallen into desuetude.[57] Second, administrative adjudication and its surrounding doctrines have evolved in ways that merit brief summary here.

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[54] 285 U.S. 22 (1932).

[55] 5 U.S.C. §§ 554-57.

[56] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); see generally Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283 (1986) (noting, however, the marked inconsistency with which the Court has applied this doctrine).

[57] Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 247-63 (1985).

Crowell evinced two concerns that remain pertinent today, the extent of Congressional power to allocate judicial power to other entities and the fairness of adjudication performed outside court. I discuss each in detail below, and pause to introduce the latter now. Modern administrative law ensures fair adjudication partly through structure, and partly through procedure. Many agencies draw their membership from regulated groups, in stated pursuit of expertise. Typically, such an agency both investigates and adjudicates. The combination aids policymaking; problems of bias and interest, however, necessarily arise. These are dealt with partly by organizational separation of the investigative and adjudicative staffs below the level of the heads of the agency.[58] Also, administrative law judges enjoy statutory guarantees of their independence,[59] and are required to follow specified procedures designed to balance informality and accuracy.[60]

The Supreme Court has upheld this general arrangement against due process attack.[61] The Court is prepared to credit the protections flowing from separation of functions and procedural guarantees.[62] Moreover, the Court recognizes that obtaining the policymaking advantages of combined functions at the top of the agency has some cost to adjudicative neutrality.[63] Nevertheless, the Court has made

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[58] See generally Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies, 81 Colum. L. Rev. 759 (1981).

[59] See 5 U.S.C. §§ 3105, 5372, 7521.

[60] See 5 U.S.C. §§ 554-57.

[61] Withrow v. Larkin, 421 U.S. 35 (1975)(state board of medical examiners could both investigate and decide charges against a doctor).

[62] See Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) (administrator acting as prosecutor could make preliminary assessment of civil penalties that could become available to the agency; administrative law judge adjudicated the penalties.)

[63] See Friedman v. Rogers, 440 U.S. 1, 18 (1979) (legislature can draw administrators from an organization sympathetic to the rules to be enforced); Hortonville

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it clear that a scheme's particular characteristics can present unacceptable dangers of bias or interest.[64]

D. An Approach to the Constitutional Issues.

At this point in the discussion, we can derive some general precepts for analysis. First, both administrative law and the private delegation cases display a basic ambivalence about the decider's neutrality-- the benefits of obtaining knowledgeable or autonomous decisionmaking are gained at the risk of introducing unacceptable levels of bias or interest. This ambivalence also affects administrative law outside the adjudicative context, in ways that are pertinent to the analysis here. Traditional views of policymaking as the neutral and expert elaboration of the public's will have given way to theories that recognize and try to control private influences. Current theories of legislation emphasize its capacity to provide private goods for special interests;[65] controversy surrounds the extent to which courts should try to offset this tendency.[66] And administrative law has recently

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[63] Joint School Dist. No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976) (school board could both negotiate with teachers and discharge them for illegal strike after negotiations failed); FTC v. Cement Institute, 333 U.S. 683 (1948) (FTC Commissioners could both testify before Congress regarding the illegality of a practice and later adjudicate the matter).

[64] For example, in Gibson v. Berryhill, 411 U.S. 564 (1973), the Court would not allow a licensing board drawn from one-half of a state's optometrists to decide whether the other half were engaged in unprofessional conduct. See also Tumey v. Ohio, 273 U.S. 510 (1927) (town mayor could not adjudicate where fines paid his salary); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (Tumey controlled where fines formed a substantial part of municipal revenues).

[65] See generally Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 Corn. L. Rev. 1 (1982).

[66] Compare, e.g., Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223 (1986), with Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263 (1982).

seen the ascendancy of an interest representation model of policymaking.[67] Here too, there are countercurrents. Some views of the administrative process emphasize the opportunity--and the duty-- of administrators to seek their best conception of the public interest, constrained as decision may be by the reality of private pressure.[68]

To promote public-regarding policy, modern administrative law relies on simultaneously fostering and controlling the oversight activities of all three branches of government.[69] When decision is shifted from public to private hands, we lose some or all of these monitoring devices. If we can identify substitutes that will tolerably conform private decision to the public interest, a delegation should survive.

It may be that in most situations where private delegations are upheld, the courts perceive an overall congruence of interest between the private deciders and the public. Thus, in monetary policymaking the private bankers and the members of the Board of Governors share an interest in the long-run stability of the currency. Similarly, we allow self-regulation by securities exchanges or government regulation by members of professional groups because of their need to maintain public confidence. Manifestly, reliance on private interest to achieve public purposes produces imperfect results, but so do the alternatives.

We also use shared interests within groups to promote fairness when they regulate themselves. For example, a premise of collective bargaining is that workers derive net advantages from negotiating with management as a group, whatever their internal disagreements.[70] And the state bar is expected to understand the pressures that lawyers face. Here, the danger is that shared group interests will subordinate the interests held in common with the public.

The foregoing considerations suggest that arbitration can find a place in the administrative state. The central premise of arbitration, that the parties' consent to the process and practical guarantees of the decider's neutrality justify informal and final procedure, serves the important purpose of neutralizing bias. The overall similarity of arbitral and administrative processes demonstrates the extent to which their purposes are the same. Indeed, the nature of arbitration calls to mind an observation that Judge Friendly made while discussing administrative procedure: "the further the tribunal is removed from . . . any suspicion of bias, the less may be the need for other procedural safeguards."[71]

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[67] Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975).

[68] Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985).

[69] See generally Bruff, Legislative Formality, Administrative Rationality, 63 Tex. L. Rev. 207 (1984).

[70] Jaffe, supra note 39, at 235.

Two principles should guide our approach to the constitutional issues. First, the optimal level of specificity for constitutional rules that organize the government is low. This is true for several reasons. The government is vast and diverse; perforce, even statutes with government-wide effect (e.g., the APA) are phrased in generalities. Moreover, prediction of the effects of rules on institutions is hazardous, even in the short run.[72] And the obstacles to altering constitutional rules are considerable, even when they are generated by the courts.

Second, deference is due to agency choice of procedure, whether the issue is statutory authorization[73] or constitutionality.[74] Whether analysis of process is characterized as policy, statutory authority, or constitutionality, the acceptability of procedure is a function of the particular issues to be decided.[75] Agencies are usually best situated to weigh the factors bearing on choice of procedure, in search of the best alternative.

Appraising the consistency of government arbitration with articles II and III of the Consitution involves separation of powers analysis. Here a fundamental distinction must be made in order to understand the cases. Separation of powers cases involving the aggrandizement of one branch at the expense of another present greater problems than those involving only a possible interference with the prerogatives of one branch.[76] In the aggrandizement cases, the Court has favored a formalist approach that reasons logically from the constitutional text and what is known about the framers' intentions.[77] The consequence is to draw relatively bright lines between the functions of the branches.[78] In the interference cases, the Court has used a functional approach that inquires whether the core responsibilities of the branch in question have been impaired.[79]

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[71] Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1279 (1975).

[72] For an illustrative account of the unanticipated effects of constitutional jurisprudence on bureaucracies and their clients, see Mashaw, The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims, 59 Corn. L. Rev. 772 (1974).

[73] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[74] Mathews v. Eldridge, 424 U.S. 319 (1976).

[75] See Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. Pa. L. Rev. 485, 536-37 (1970).

There may be several reasons for the use of two doctrinal approaches. In cases involving the relations of the constitutional branches inter se, formalism offers the advantages of preserving clear lines of political accountability and of minimizing evasions of constitutional strictures.[80] In cases involving the distribution of functions within the "fourth branch" of the bureaucracy, however, the simplicities of formalism fit so badly with the complexities of administration that the Court shifts to a functional inquiry into the overall relationships between the constitutional branches and the agencies.[81] The functional test is far more permissive of diverse government structure than is formalism.

Thus, several considerations suggest that formalist analysis will prove inapposite to government arbitration. First, the aggrandizement concerns that prompt use of the approach are absent. Second, we are wise to minimize constitutional prescription in this area. And third, the need to defer to legislative or administrative choice of process suggests a constitutional test containing flexibility.

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[76] Strauss, Separation of Powers in Court, A Foolish Inconsistency?, -- Corn. L. Rev. --- (forthcoming, 1987).

[77] E.g., INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 106 S.Ct. 3181 (1986).

[78] See generally Bruff, On the Constitutional Status of the Administrative Agencies, 36 Am. U. L. Rev. 491 (1987).

[79] E.g., Nixon v. Administrator of General Services, 433 U.S. 425 (1977); CFTC v. Schor, 106 S. Ct. 3245 (1986).

[80] Bruff, supra note 78, at 506-09.

[81] Strauss, supra note 5.

II. EXECUTIVE BRANCH SUPERVISION.

The President's constitutional powers "are not fixed, but fluctuate,"[82] depending on the context in which they are considered. His needs to supervise administration vary according to the subject matter. His claims are strongest where he has independent constitutional powers, as in foreign affairs, and weakest where individual liberties enjoy their own constitutional protection.[83] In addition, Congress may control executive oversight within limits that are presently uncertain.[84] For example, by placing some functions in independent agencies, Congress has expressed its desire that executive oversight be minimized.[85]

It is possible for Congress to insulate a function from the oversight of all three constitutional branches in a way that hampers political accountability or allows arbitrariness. Courts often approach this question as a due process issue of the permissibility of private delegations, as I noted above. Still, there is a distinct question here that relates to executive supervision. Some functions are neither reviewable in court nor readily amenable to effective congressional oversight. Examples include foreign affairs and monetary policymaking. For such functions, the nature and extent of ties to the executive largely define the sufficiency of governmental control. Therefore, weak ties to the executive are less justifiable if oversight by the other branches is disabled, and more justifiable if it survives.

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[82] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

[83] Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 495-98 (1979).

[84] *See generally* G. Robinson, E. Gellhorn & H. Bruff, The Administrative Process 117-31 (3d ed. 1986).

[85] Notwithstanding a current debate on the constitutional status of the independent agencies, *see generally* Symposium, "The Uneasy Constitutional Status of the Administrative Agencies," 36 Am. U. L. Rev. 277 (1987); Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41, the Supreme Court continues to treat them as a viable part of the government. *E.g.*, CFTC v. Schor, 106 S.Ct. 3245 (1986); *see* Bowsher v. Synar, 106 S.Ct. 3181, 3188 n. 4 (1986).

Agency procedure also affects presidential power. Adjudication enjoys constitutional[86] and statutory[87] protections from outside interference by anyone, including the President. In contrast, rulemaking is subject to increasingly ambitious executive management.[88]

Relationships between the executive and private deciders should fluctuate according to these variables of subject matter, government structure, and procedure. If ties of certain kinds between officers and deciders can be identified as consistent with the nature of the executive's supervisory needs for the particular context, article II concerns should be satisfied.

A. The Scope of the Appointments Clause.

In Buckley v. Valeo,[89] the Supreme Court held that Congress could not appoint members of the Federal Election Commission. The Court read the appointments clause[90] to govern the selection of anyone "exercising significant authority pursuant to the laws of the United States."[91] In defining that phrase, the Court distinguished informational and investigative functions, which did not need to be performed by "Officers of the United States," from the FEC's enforcement powers, such as litigating, rulemaking, and adjudicating, which could only be performed by officers or their employees.[92]

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[86] Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

[87] 5 U.S.C. § 557(d).

[88] See generally Symposium, Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291, 23 Ariz. L. Rev. 1195 (1981).

[89] 424 U.S. 1 (1976).

[90] U.S. Const., Art. II, § 2, cl. 2.

[91] 424 U.S. at 126.

[92] The Court noted that employees are "lesser functionaries subordinate to officers of the United States." Id. at 126 n.162.

Buckley is a rather formalist opinion with no obvious limits to its logic.[93] It can easily be read to require that all execution of the laws be kept in the hands of federal employees. Nevertheless, the Court's distinctions are surely related to the context of the case. The Court was considering whether Congress could assume the President's appointments power, not whether it could authorize or require the delegation outside the government of some functions that could be performed by the executive. The problem of congressional aggrandizement disappears when Congress allocates the appointment power elsewhere.[94] The need to prevent interference with core functions suggests an inquiry whether the President is denied a supervisory role that is necessary to his duty to oversee the execution of the laws.

Thus, Buckley raises but does not resolve the question of most interest here: what relationships between an officer and a decider are necessary to satisfy concerns related to the appointments clause? A priori, the variety of possible relationships between the executive and those who actually make policy suggests the inadvisability of a constitutional rule that focuses on formal appointment or employment provisions.

This point is illustrated by Melcher, in which the district court declined to extend Buckley to condemn the composition of the Federal Open Market Committee. Seven FOMC members (the Board of Governors of the Federal Reserve System) are unquestionably "Officers of the United States." The other five are private bankers selected by the boards of directors of the regional Federal Reserve Banks.[95] The court declined to characterize the private members of the FOMC as government officers, although the Board of Governors supervises them in their other capacity as officers of the various Reserve Banks.[96] The court pointed to the absence of any clear authority for the supervision of these individuals in their role as FOMC members.

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[93] Bruff, supra note 78, at 500.

[94] See Melcher v. Federal Open Market Committee, 644 F. Supp. 510, 520 (D.D.C. 1986) (distinguishing both Buckley and Bowsher v. Synar, 106 S. Ct. 3181 (1986), as involving "attempts to enlarge the legislative authority at the expense of that of the Executive Branch.")

[95] The boards, in turn, are composed of two-thirds private members and one-third Board of Governors appointees.

[96] The Board of Governors approves their selection and compensation, and can dismiss them for cause. 12 U.S.C. §§ 248(f), 307, 341.

This conclusion is consistent with any of three readings of Buckley. First, courts could ask only whether a decider is technically a government employee. Second, they could ask whether the decider is in substance a government employee. As Melcher illustrates, there are many possible relationships short of full-time employment. Courts could assess each one to determine whether the person is effectively under the control of an officer. Third, the courts could ask a more focused question: is the particular activity in question sufficiently controlled by an officer? This third inquiry seems the most appropriate, since it draws attention to the precise needs of the executive for a supervisory role.

The functions that Buckley denied to congressional appointees all involve the coercion of primary conduct by government. Perhaps in that context the executive may never delegate its responsibilities. Buckley, however, distinguished investigation from enforcement for an unrelated reason, the need for Congress to investigate as an aid to legislation. Moreover, it is easy to exaggerate the differences between coercive and noncoercive governmental action. As economists are fond of reminding us, the carrot and the stick both influence behavior. Nevertheless, legal controls on government monitor coercive activities most closely.[97] Functional analysis can give some weight to the degree of coercion present in an activity, without resting decision exclusively on that factor. The diverse subject-matter of federal policymaking suggests that all should not hinge on a single characteristic.

Suggestions have arisen that arbitration be employed in some enforcement contexts, such as the revocation of permits for hazardous waste facilities.[98] It should be possible to define a role for arbitration in enforcement, if certain limits are set. The executive has traditionally enjoyed wide prosecutorial discretion, because the component activities of gathering information, setting priorities, and allocating resources affect many of the agency's responsibilities and are difficult to monitor effectively from the outside.[99] Hence it would divest the executive of core functions to allow an arbitrator to decide whom to prosecute, or to decide other issues that implicate general enforcement policy.

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[97] See, e.g., Heckler v. Chaney, 105 S.Ct. 1649, 1656 (1985).

[98] Robinson, U.S. Environmental Protection Agency Institutes Alternative Dispute Resolution in its Enforcement Program, 18 Dis. Res. News (ABA Com. on Dis. Res. 1986).

[99] See Heckler v. Chaney, 105 S.Ct. 1649, 1656 (1985); FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967).

Private neutrals could, however, play a number of other roles. First, they could influence enforcement in ways that do not formally displace executive discretion. Here, illustration is provided by ADR procedures other than arbitration. A portion of the ACUS recommendation would apply various ADR techniques to settlement of litigation, including negotiation, mediation, and "minitrials."[100] All of these techniques leave actual settlement authority in the hands of government officers. The recommendation would, however, expose settlements involving major public policy issues or third party effects to notice and comment.[101] This reminds us of the values served by exposing deciders to outside influences-- the process does not rely solely on interested parties and the ADR neutral, whose perspective may be limited, in settling cases having implications beyond their facts.

Second, it should be permissible to arbitrate fact questions underlying an enforcement dispute. Here, efficiency gains from informal process are possible without sacrificing the executive's needs to set overall enforcement priorities and policy.

Finally, although the issue is more difficult, it should be permissible to arbitrate the application to a particular respondent of settled criteria for such sanctions as permit revocation. The executive retains control of overall policy by formulating the standards for sanctions. Still, an important aspect of prosecutorial discretion concerns law-applying-- the decision whether to compromise a charge or to take it to trial. And as I have noted, administrative law has accommodated the combination of prosecutorial and adjudicative functions in a single agency, with appropriate safeguards.[102]

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[100] 1 CFR § 305.86-3, part D. Minitrials are abbreviated summaries of trial evidence, presented before principal officers of the litigants who are authorized to settle the case.

[101] At present, consent agreements are sometimes subjected to notice and comment procedures. G. Robinson, E. Gellhorn & H. Bruff, _supra_ note 84, at 549.

[102] _See_ Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) (administrator acting as prosecutor could make preliminary assessment of civil penalties that could become available to the agency; administrative law judge adjudicated the penalties.)

Nevertheless, due process values are served by reducing the potential for bias that attends the selection of sanctions by the investigating office.[103]

Thus, government arbitration creates tension between two constitutional values, executive power and due process. We can accommodate them by retaining executive control over broad issues of policy, while allocating some functions of applying policy to private neutrals. The consequent reduction in executive power, although real, should be kept in perspective. Comparison of a private delegation with the government function it displaces should include consideration of the legal constraints on that function, to see how much discretion the executive is actually losing.

A brief look at the use of ADR techniques in rulemaking will illustrate this point. Rulemaking draws the President's supervisory role directly into question, because it concerns generalized policy.[104] Nevertheless, we subject rulemakers to various "outside" influences. The original purpose of the APA's notice and comment procedures was simply to provide affected persons an opportunity to educate the policymakers.[105] Today, administrative law pursues a more ambitious goal-- to use diverse outside pressures to encourage rulemakers to follow the public interest.[106]

Under the ACUS recommendation on negotiated rulemaking, private groups negotiate a proposed rule, which then undergoes the usual notice and comment process. This process does not differ sharply from the bargaining that can occur informally under notice and comment procedures.[107] Final policy decisions remain with the government.[108] Nothing in Buckley suggests that an officer may not be influenced by others, as long as he retains the power to decide.[109]

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[103] See Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n, 426 U.S. 482 (1976) (school board could both negotiate with teachers and discharge them for illegal strike after negotiations failed). In Hortonville, provision of a neutral decider would have eliminated the need for the Court to inquire whether the facts raised a sufficient danger of bias to deny due process.

[104] Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395 (1975).

[105] Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75 Colum. L. Rev. 721, 754-55 (1975).

[106] See generally Office of the Chairman, Administrative Conference of the United States, A Guide to Federal Agency Rulemaking (1983).

It is one thing, however, to constrain executive discretion, and another to shift decisions to private hands. The possibility of unduly sacrificing executive responsibility in favor of due process values attends the use of arbitration in any policy-laden context, such as public employee labor relations and money claims against the government. Here we must seek appropriate and effective ways for the executive to control private neutrals. If such controls are available, it should be permissible for Congress or the agencies to choose arbitration.

B. Selecting Arbitrators.

The ACUS recommendations concerning voluntary or mandatory arbitration involve adjudication.[110] Here, as I will discuss, the federal courts assert a supervisory role. Nonetheless, Buckley retains some force. Even where the President's supervisory powers are limited, as with independent agencies and adjudicators, he retains his power to appoint the deciders, and a general interest in their performance.[111]

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[107] Moreover, modern agencies often employ private consultants in rulemaking, and may rely substantially on them in the deliberative process, as long as they do not abdicate the ultimate statutory responsibility for decision. United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980).

[108] 1 CFR § 305.82-4: "The final responsibility for issuing the rule would remain with the agency." See Harter, supra note 8, at 109.

[109] See also Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (coal producers may propose minimum prices to agency that can approve, disapprove, or modify them).

[110] 1 CFR § 305.86-3, parts B & C.

[111] See, e.g., J. Landis, Report on Regulatory Agencies to the President-Elect, Sen. Comm. on the Judiciary, 86th Cong., 2d Sess. 33 (Comm. Print 1960): "The congestion of the dockets of the agencies, the delays incident to the disposition of cases, the failure to evolve policies

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Moreover, administrative adjudication is often used for policymaking;[112] to that extent, the President has a substantial claim to overall supervision, not including intervention in a particular pending case.[113]

The ACUS recommends against arbitration in cases involving major new policies or precedents, significant third party effects, or special needs to honor existing precedent. These are cast as broad generalizations; at that level, they are unexceptionable. I discuss the last of them in connection with judicial power; for the others, discretion should be exercised within rather than outside the government. All three constitutional branches have oversight claims. And affected third parties, who have not consented to the use of private deciders, are entitled to the protections that administrative law and government structure provide. Still, it is necessary to guard against overgenerality. Adjudication often has visible effects beyond the parties. Within limits, the presence of such effects should not rule out arbitration.

Under the recommendations, agencies usually control whether to resort to arbitration. Mandatory arbitration is suggested only for controversies between private parties, not those involving the government as a party. The need for executive choice of process is weak when the government is acting only as arbiter of disputes between citizens. Where the government's own interests are at stake, voluntary arbitration allows agencies to choose the use of a private neutral, either before or after controversy arises. For example, if an officer is authorized to settle claims, efficiency gains can result from referring some of them to a third party for expeditious handling. That frees the officer's time for more important cases. Due process values are also served by referral of claims against the government-- the avoidance of undue interest, or an appearance of it, in the outcome. Moreover, voluntary arbitration can draw some support from Buckley and Melcher, because of its noncoercive nature.

Where the executive has a substantial interest in the outcome, methods of structuring arbitration and selecting arbitrators can reflect that interest in a compromise with

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[111] pursuant to basic statutory requirements are all a part of the President's constitutional concern to see that the laws are faithfully executed."

[112] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[113] See ABA Comm. on Law and the Economy, supra note 2, at 79, 82.

strict neutrality. The legality of a private delegation often depends on a court's judgment whether the composition of the deciding group is representative of the interests affected.[114] Thus, the goal of arbitral schemes should be balance rather than unalloyed neutrality. Frequently, those selecting private deciders must weigh the benefits of expertise in the subject matter against the costs to neutrality from the source of the expertise, for instance prior service in the agency or industry. The Administrative Conference has recognized the inevitability of these tradeoffs in its recommendation on acquiring the services of ADR neutrals.[115]

There are several ways to pursue balance in arbitration. First, the choice to arbitrate can be vested with a public/private body. For example, arbitration of contract impasses with federal workers occurs on the approval of the Federal Service Impasses Panel, a part-time body composed partly of government employees.[116] This approach responds to the fact that "interest" arbitration, which resolves distributional issues between the parties on a prospective basis, is materially more policy-oriented than "grievance" arbitration, which considers rights under preexisting arrangements.[117]

Second, if a multimember panel is used, its composition can reflect affected interests in appropriate proportions.[118] . For example, bargaining impasses between the Postal Service and its employees are submitted to an arbitral board composed of one member selected by the Service, one by the union, and a third selected by the other two members.[119] In another example of a mixed panel, the Department of Education adjudicates certain disputes with its grant recipients through a board formed of a minority of federal employees and a majority of private members.[120]

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[114] Note, Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking, 94 Harv. L. Rev. 1871, 1883 & n.66 (1981).

[115] 1 CFR § 305.86-8; see generally Ruttinger, Acquiring the Services of Neutrals for Alternative Disputes Resolution and Negotiated Rulemaking, Report for the Administrative Conference of the United States (1986).

[116] 5 U.S.C. § 7119.

[117] See generally Kanowitz, supra note 23, at 244-50; Craver, supra note 13; Note, Binding Interest Arbitration in the Public Sector: Is it Constitutional?, 18 Wm. & Mary L. Rev. 787 (1977).

[118] See Melcher v. Federal Open Market Committee, 644 F.Supp. 510, 523 (D.D.C. 1986) (Buckley concerns alleviated by the presence of a government majority on the FOMC)

Third, even if a single arbitrator is employed, the selection procedure can take the preferences of both sides into account. In commercial arbitration, the American Arbitration Association sends a list of names to the parties, who strike those to whom they object and number the others in order of preference. The AAA selects the arbitrator according to mutual preference.[121] Federal agencies have borrowed these practices, sometimes by direct referral to the AAA.[122]

These techniques should furnish the executive sufficient tools to meet supervisory needs related to selecting the deciders. Compare administrative adjudication, usually performed in the first instance by Administrative Law Judges. In both cases, an agency can consider the overall neutrality and competence of the pool of deciders when deciding whether to utilize their services instead of alternative processes. In arbitration, agencies can also influence the choice of a decider for the case at hand. In contrast, ALJs are usually assigned in rotation.[123] This comparison does not consider, though, the nature of an appropriate role for executive supervision of adjudicators. I now turn to that topic.

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[119] 39 U.S.C. § 1207. Failing agreement on a third member, the Director of the Federal Mediation and Conciliation Service chooses one.

[120] 20 U.S.C. § 1234(c); _see generally_ Boasberg, Klores, Feldesman & Tucker, _Federal Grant Dispute Resolution, A Report for the Administrative Conference of the United States_, in Mezines, Stein & Gruff, Administrative Law § 54.05 (1983).

[121] Coulson, _supra_ note 21, at 34. The person selected is required to disclose "any circumstances likely to affect impartiality," and is subject to disqualification by the AAA. _Id_. at 35.

[122] _E.g._, 29 CFR § 1440 App. (pesticide registrations); 40 CFR § 305.31 (Superfund).

[123] 5 CFR § 930.212. The Supreme Court, however, has approved some agency discretion to match an ALJ's background to the subject matter. Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 139-40 (1953).

C. Supervising Arbitrators.

Arbitration in federal programs should be subject to two kinds of executive monitoring. First, there should always be some overall scrutiny of whether it is meeting expectations. Like any procedure, arbitration is more successful for some disputes than others.[124] Especially in an era of experimentation with ADR techniques, the executive has a continuing monitoring responsibility. Federal arbitration programs often concern large stakes, such as millions of dollars of aggregate expenditures of public or private money.[125] For some arbitral programs, then, "wholesale" review is more important to the executive than is "retail" review of a particular decision.

Generalized oversight also helps to protect private delegations from judicial invalidation. For example, many disputes between securities dealers and their customers are arbited by the self-regulatory organizations of the industry; courts approving this scheme have relied partly on federal approval of the arbitral procedures.[126] Oversight has its perils, though: when the government is a party to arbitration, monitoring must steer a careful course, assessing the overall accuracy of the process without intervening in particular cases.[127]

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[124] See Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916 (1979)(emphasizing the connection between the collective bargaining relationship and the success of labor arbitration).

[125] A number of specific examples are discussed in §§ III and IV infra.

[126] Todd & Co., Inc. v. SEC, 557 F.2d 1008, 1012 (3d Cir. 1977); R. H. Johnson & Co. v. SEC, 198 F.2d 690, 695 (2d Cir.) (Frank, J.), cert. denied, 344 U.S. 855 (1952); see generally Fletcher, Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements, 71 Minn. L. Rev. 393 (1987); Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279 (1984).

[127] Compare Ass'n of Administrative Law Judges, Inc. v. Heckler, 594 F.Supp. 1132 (D.D.C. 1984) (generalized executive review of ALJ performance is legitimate, as long as it does not skew the outcome of particular adjudications); see also Note, Administrative Law Judges, Performance Evaluation, and Production Standards:

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Second, agencies need to control the conduct of particular arbitrations, within limits. They can do so in two primary ways: by providing a standard for decision, and by reviewing awards to determine fidelity to it.[128] Ordinarily, an agency can elaborate its statutory standards through rulemaking. Therefore, even where statutes mandate use of arbitration, the executive can control it. Of course, the specificity of standards should vary with the subject matter.[129] Instructions should be more detailed for relatively policy-laden subjects (such as interest arbitration in labor relations) than for more fact-intensive ones.[130]

Some arbitration uses standardless norms such as substantial justice. Here, executive supervision would occur only in the choice to resort to arbitration. Therefore, such a standard should not be used where significant policy effects are present. For example, it would be inappropriate for claims against the government, because it could allow payments unauthorized by law.

Review of arbitration can occur either in the agency or in court under the criteria of the U.S. Arbitration Act, which allows vacating awards on very narrow grounds that include corruption and facial illegality.[131] The ACUS recommendation facilitates this limited review by calling for a brief, informal discussion of the factual and legal basis for an award. When the government is not a party to arbitration, agencies have little reason to displace judicial review. When the government is a party, supervisory needs may call for

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[127] Judicial Independence Versus Employee Accountability, 54 G.W. L. Rev. 591 (1986).

[128] Also, if an arbitrator is exceeding delegated authority in a pending case, an agency may seek redress by invoking the familiar jurisdiction of the courts to determine an arbitrator's jurisdiction. See text at notes 27-8 supra.

[129] I discuss the sufficiency of standards in § IV infra as they relate to fairness to affected individuals; here the concern is with the executive's needs.

[130] See Craver, supra note 13, at 566-67, for examples of varying standards used for interest arbitration.

[131] 9 U.S.C. § 10. The grounds include: (a) "corruption, fraud, or undue means," (c) "refusing to hear evidence pertinent . . . to the controversy," and (d) "exceed[ing] their powers . . . ."

administrative review.[132] If so, there would be no need for the courts to exercise duplicative "retail" review, although they could examine issues concerning the "wholesale" validity of the scheme, as I will discuss.

Administrative review under the Arbitration Act's standards should satisfy the executive's supervisory needs. Again, it is instructive to compare administrative adjudication, which is structured to reflect its greater policy content. Agencies may overturn ALJ decisions readily, as long as the final decision is supported by substantial evidence.[133] Indeed, final adjudicative authority is often lodged with the political executives at the head of the agency.[134] In arbitration, the executive loses ordinary fact review, but gains the speedier resolution of disputes. More intensive review would vitiate the distinctive advantages of arbitration, because it would force arbitrators to provide the procedural formalities necessary to build a suitable record.

III. THE SCOPE OF ARTICLE III.

A. Allocating Judicial Power to Agencies and Arbitrators.

To what extent may adjudicative authority that could be assigned to the federal courts be granted to private deciders? Before addressing this question directly, we must consider a preliminary issue: to what extent may executive officers exercise or supervise potential article III functions? Until recently, one would have thought that the latter issue was settled by Crowell v. Benson,[135] which upheld the placement of adjudicative authority in an administrative agency. The problems stem from some implications of the Court's recent decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,[136] in which a badly divided Court held that the allocation of certain functions to bankruptcy judges violated article III.

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[132] As limited by the Arbitration Act, this function would not threaten introducing impermissible levels of bias.

[133] E.g., FCC v. Allentown Broadcasting Co., 349 U.S. 358, 364 (1955).

[134] See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[135] 285 U.S. 22 (1932).

[136] 458 U.S. 50 (1982).

In Northern Pipeline, Congress had created bankruptcy judges without article III status,[137] but with powers closely resembling those of federal judges. The bankruptcy judges were authorized to decide all issues pertinent to the proceedings, including claims arising under state law, with review by article III judges.[138] A plurality of four justices[139] signed a formalist opinion that defined some matters as inherently judicial in the sense that they must be performed by federal courts, rather than supervised by them. Bankruptcy matters did not come within a set of exceptions to mandatory article III jurisdiction that the plurality identified.

The exception pertinent to us is the one for adjudication of "public rights," which the plurality defined narrowly as claims against government that Congress could commit entirely to executive discretion, but not controversies between private persons arising incident to a federal program. The public rights doctrine originated in a conclusory passage in Murray's Lessee v. Hoboken Land & Improvement Co.,[140] in which the Court upheld a summary procedure for government recoupment of its funds from one of its customs collectors:

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable

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[137] Instead of life tenure, they had 14-year terms; there were no protections against salary diminution.

[138] Review was to be by the "clearly erroneous" standard, 458 U.S. at 55-56 n. 5.

[139] Brennan, Marshall, Blackmun, and Stevens.

[140] 18 How. 272, 284 (1856). Murray's Lessee appears to overturn an earlier case, United States v. Ames, 24 F.Cas. 784 (C.C.C. Mass. 1845, No. 14,441), in which a court refused to enforce an arbitration award involving water rights of the United States and another riparian owner. As an alternate ground of decision, the court stated a principle forbidding the delegation of article III judicial power outside the courts.

> of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

The Court has never provided a satisfactory explanation of the public rights doctrine. Instead, the Court, groping for appropriate limits to the jurisdiction of legislative or administrative courts, has used it to label outcomes.[141] That is unfortunate because of the difficulty of the problem.

The *Northern Pipeline* plurality thought that public rights cases could be committed to agencies, at least with judicial review.[142] It appeared to be more willing to accept nonjudicial decision of issues of fact than of law, since it characterized *Crowell* as involving only the former.[143] The plurality conceded, however, that the doctrines *Crowell* relied on to preserve plenary review of issues of law had eroded in the interim.[144] This line of analysis cast doubt on the permissibility of ordinary delegations of adjudicative power to agencies, because the plurality did not specify the relationship between agencies and courts that was necessary to pass constitutional scrutiny.

The plurality explained the dichotomy between public and private rights as resting partly on sovereign immunity. Congress, free to deny all relief for claims against the government, may take the lesser step of allocating the claims to an alternative forum. Accordingly, the plurality would not define public rights as everything created pursuant to the substantive powers of Congress, because that would include some displaced private rights of action.[145] This rationale does not persuasively explain, however, why Congress may more readily shift federal questions out of the courts than diversity cases.[146]

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[141] *See generally* Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197.

[142] 458 U.S. at 67-68 & n. 18.

[143] 458 U.S. at 78-82.

[144] *Id*. at 82 n. 34.

[145] 458 U.S. at 80 n. 32.

[146] Redish, *supra* note 141, at 208-11.

Two concurring justices[147] would have required only that removed state law claims be decided by an article III court. The dissenters[148] pointed out the inconsistency of the plurality's formulation with the nature of much administrative adjudication.[149] They thought that the bankruptcy scheme satisfied a functional inquiry. They were prepared to examine the strength of the legislative interest in placing decision in another forum (in this case, a heavy caseload and a need for specialization). They gave weight to the preservation of judicial review. They found no danger that the other branches were aggrandizing themselves at the expense of the courts as long as the subject matter was not of special significance to the political branches.

The reason that Northern Pipeline cast broad and troubling implications beyond its bankruptcy context lies in the plurality's formalist approach.[150] The broad sweep of formalism is inappropriate for deciding how to allocate adjudicative power among the branches. The justifications for formalism (preventing aggrandizement and assuring political accountability) are minimal here.[151] Functional analysis focuses the Court's attention on the policies underlying article III, and permits the diverse procedural arrangements that the structure of our government demands. Fortunately, later cases have employed functionalism to curtail the implications of Northern Pipeline.

In Thomas v. Union Carbide Agr. Products Co.,[152] the Court upheld mandatory arbitration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[153] Under the Act, manufacturers wishing to register a pesticide must give the EPA their research data on the product's effects. The EPA considers the data for both the accompanying registration and later ones for similar products, submitted by other manufacturers. Later registrants must compensate earlier ones for the use of the data, in amounts determined by arbitration if the manufacturers cannot agree. The agency uses the AAA's roster of commercial arbitrators and its usual methods for mutual selection by the parties; there are special AAA procedures for conducting FIFRA arbitrations.[154] The arbitrator's findings and determination can be set aside in federal court only for "fraud, misrepresentation, or other misconduct."[155]

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[147] Rehnquist and O'Connor.

[148] White, Burger, and Powell.

[149] 458 U.S. at 101-02.

[150] Strauss, supra note 5, at 629-33.

[151] See Bruff, supra note 78, at 502-09.

[152] 105 S. Ct. 3325 (1985); see generally Note, FIFRA Data-Cost Arbitration and the Judicial Power: Thomas v. Union Carbide Agricultural Products Co., 13 Eco. L. Q. 609 (1986).

[153] 7 U.S.C. § 136a(c)(1)(D)(ii).

Justice O'Connor's majority opinion rejected "doctrinaire reliance on formal categories" as a guide to article III, in favor of attention to the origin of the right at issue and the congressional purpose behind the scheme. The majority characterized FIFRA as creating a compensatory right with many public characteristics, as in use of private data by the EPA.[156] It concluded that Congress could authorize an agency to "allocate costs and benefits among voluntary participants" in a regulatory program without providing an article III adjudication.

Justice O'Connor characterized Northern Pipeline as holding only that Congress could not give a non-article III court power to decide state law contract actions without consent of the litigants and subject only to ordinary appellate review. She rejected an argument that FIFRA had created a "private right," explicitly disapproving the definition advanced by the Northern Pipeline plurality insofar as it turned on whether "a dispute is between the Government and an individual."[157] Justices Brennan, Marshall, and Blackmun concurred, explaining their Northern Pipeline position as focusing on the state law nature of the claims involved, and abandoning any restriction of public rights cases to those in which the government is a party.[158]

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[154] 29 CFR § 1440 App.

[155] 7 U.S.C. § 136a (c)(1)(D)(ii). The EPA can enforce compliance with the award through sanctions including denial of compensation or cancellation of a party's registration, as the case may be.

[156] The Court had already held EPA's consideration of the data to be a "public use," although the "most direct beneficiaries" of that use were the later applicants. Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984)(holding that in certain circumstances this public use effected a compensable taking).

[157] 104 S.Ct at 3335-36.

In passing, the Court squelched the Northern Pipeline plurality's threat to the structure of the administrative state. The Court said that because the statute in Crowell replaced a common law action with a statutory one, it fell within mandatory article III jurisdiction.[159] Nevertheless, the Court recognized that judicial review of administrative adjudication is often limited or even unavailable.[160] Thus the Thomas majority removed any question that the continued vitality of Crowell rests on the outmoded doctrines requiring stringent judicial review that the Crowell Court employed.[161]

Turning to the use of arbitration, the Court noted Congress' need to streamline compensation controversies.[162] The Court perceived a close nexus between use of arbitration and effective administration of the pesticide registration program. And it emphasized the consent of affected firms: it considered the danger of encroachment on the judiciary's central role to be "at a minimum when no unwilling defendant is subjected to judicial enforcement power."

The Court accepted the statute's limitations on judicial review, which it read to allow reversing arbitrators "who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."[163] The concurring Justices, like the majority, echoed the "manifest disregard for the law" standard that has widespread use in judicial review of arbitration.[164] The Court also held that review for constitutional error was available; that alleviated any due process concerns about the extent of review.[165]

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[158] Id. at 3341-41. Justice Stevens, also concurring, thought the challengers lacked standing.

[159] 105 S.Ct. at 3336.

[160] Id. at 3334.

[161] See text at notes 56-57 supra.

[162] Arbitration replaces an earlier procedure by which EPA adjudicated compensation, subject to judicial review. This proved cumbersome and unworkable; in 1978 Congress turned to arbitration. 105 S.Ct. at 3328-30.

[163] 105 S. Ct. at 3339.

[164] Id. at 3344; see Fletcher, Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements, 71 Minn. L. Rev. 393, 456 (1987).

Thomas suggests that common law claims must be left with the judiciary. The Court has since modified its stance. In Commodity Futures Trading Com'n v. Schor,[166] the Court upheld the CFTC's power to entertain state law counterclaims in reparation proceedings, in which disgruntled customers seek redress for brokers' violations of statute or regulations. Agency adjudicators were authorized to decide counterclaims arising out of the transactions in the complaint, if the respondent chose to assert them there. Schor filed a claim for reparations, and was met with a counterclaim for debt.

Justice O'Connor's opinion for seven justices relied in part on consent-- Schor chose the CFTC's "quicker and less expensive" procedure, instead of a lawsuit. Indeed, the Court compared this option to arbitration, and thought that choice of alternate procedure minimized separation of powers concerns.[167] The Court then asked whether the new forum exercised the "range of jurisdiction and powers normally vested only in article III courts," and whether the latter retained the "essential attributes of judicial power." Only the jurisdiction over counterclaims differed from the usual agency model.[168] The Court saw no reason to deny agencies all pendent jurisdiction,[169] especially where it allowed informal resolution of disputes arising under the federal program.[170] Thus, Schor suggests that agencies may resolve any state-law claim that is closely related to a federal issue within their jurisdiction.

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[165] The parties had abandoned due process objections to the nature of statutory review of the arbitrations, so the Court did not formally address that issue. 105 S. Ct. at 3339.

[166] 106 S.Ct. 3245 (1986).

[167] 106 S.Ct. at 3260.

[168] The CFTC's jurisdiction was specialized; its enforcement powers were limited; its orders received normal judicial review.

[169] Concerns for federalism were insufficient to condemn the scheme, since federal courts could have entertained the claims.

[170] Justices Brennan and Marshall, dissenting, argued that the majority was allowing the undue dilution of judicial authority in service of legislative convenience.

In both Thomas and Schor the Court associated coercion with inherent judicial power. That casts some doubt on strictly nonconsensual arbitration, for example in regulatory enforcement. Nevertheless, the Court's characterization of FIFRA registrations as "voluntary" may signal its intention to employ a narrow definition of coercion. Therefore, the Court's article III concerns may be satisfied when either participation in the federal program or resort to arbitration has voluntary aspects. The Court sometimes examines consent more closely, however, in cases directly presenting issues about the fairness of arbitration to affected persons.[171]

Another of the Court's concerns is to honor the original purpose of article III's tenure protections: to guarantee the independence of adjudication from political pressure emanating from the executive or Congress. In Thomas, the Court remarked that shifting from agency adjudicators to private arbitrators "surely does not diminish the likelihood of impartial decision-making, free from political influence."[172] And in Schor it noted that Congress had placed adjudication in an independent agency, which would be "relatively immune from the 'political winds that sweep Washington.'"[173] This suggests that arbitration, compared to the alternative of agency adjudication, promotes article III values by increasing the independence of the decider.

Today, it seems unlikely that Congress will run afoul of Northern Pipeline unless no substantial purpose is served other than shifting business out of the federal courts, and the powers of the new tribunal (and, perhaps, the tenure of the deciders) closely approximate those of the courts. In such situations, courts are likely to find interference with their core functions. In contrast, where expeditious process clearly serves non-article III functions, such as ordinary program administration, the courts are not likely to insist that their already heavy caseload be increased. Therefore, arbitration should be safe from a successful article III assault as long as it is confined to specialized subject matter within federal programs that have related executive functions. Indeed, allocating such matters to agencies or arbitrators can free the courts to perform their most important responsibilities.

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[171] See § III. B. infra.

[172] 105 S.Ct. at 3338.

[173] 106 S.Ct. at 3250.

B. Nonarbitrable Subject Matter.

Judicial deference to agreements to arbitrate has limits. The Court has held that certain federal statutes confer nonwaivable rights to federal court enforcement. The doctrine stems from Wilko v. Swan,[174] in which the Court refused to enforce an arbitration agreement between a securities customer and a brokerage firm. The Court held that the policies of the Arbitration Act were overridden by a provision in the Securities Act of 1933 forbidding waiver of compliance with the Act's requisites. The Court was concerned that disparities in bargaining power could debase consent to arbitration. Nor did the Court consider judicial review of arbitral awards sufficient to protect the customer's statutory rights, in view of the "manifest disregard of the law" standard used by courts under the Arbitration Act.[175]

Wilko thus demonstrates the potential for tension between the contractual values of the Arbitration Act and the paternal values of much regulatory legislation. Not surprisingly, the Court has wavered between these values in subsequent cases.[176] For example, the Court recently enforced an agreement to arbitrate antitrust claims.[177] It was unwilling to assume that arbitration was an inadequate mechanism to resolve public law issues, even in view of the minimal nature of judicial review.

Confusion and inconsistency in this body of case law probably result from the presence of a number of competing considerations. To sort them out, let us consider a prominent recent case. In Alexander v. Gardner-Denver Co.,[178] the Court held that a collective-bargaining agreement to arbitrate discrimination charges did not foreclose resort to a Title VII suit.[179] The Court appeared to take a careful approach to consent issues: it suggested that the union's acceptance of arbitration should not be imputed to its individual members for claims of discrimination as opposed to economic issues, for which shared interests would make the union a more reliable proxy.[180] The courts should examine the adequacy of consent in arbitration programs; as in Alexander, they can do so for the general context without delving into the circumstances of each individual referral.

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[174] 346 U.S. 427 (1953).

[175] 346 U.S. at 436-37.

[176] See generally Fletcher, supra note 126, at 404-20; Kanowitz, supra note 23, at 257-61. Another securities case pends in the Supreme Court. McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir.), cert. granted, 107 S.Ct. 60 (1986)(No. 86-44).

[177] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S.Ct. 3346 (1985)

[178] 415 U.S. 36 (1974).

The Alexander Court emphasized that "the resolution of statutory or constitutional issues is a primary responsibility of courts."[181] Judge Edwards has suggested that although the elaboration of important public law norms should be left to the federal courts, the application of clearly defined rules of law can safely be left to arbitrators-- indeed, such an allocation of responsibilities might maximize the efficiency of public law.[182] This recognizes that the legal skills required to interpret statutes do not differ sharply from those required to interpret contracts.[183] Still, there is no bright line between law-making and law-applying-- Alexander noted the broad language of Title VII, suggesting that the application of this norm cannot yet be readily separated from its elaboration. That suggests that courts may countenance arbitration only when it steers well clear of the line.

The Alexander Court thought that the fact-finding process of arbitration was inferior to a trial for the resolution of Title VII claims, but its "reasons" for this conclusion simply described the ways that arbitration usually deviates from trial process.[184] The Court's sense that arbitration may be

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[179] See also McDonald v. City of West Branch, 104 S.Ct. 1799 (1984)(unappealed arbitration does not preclude civil rights litigation); Carlisle, supra note 30.

[180] 415 U.S. at 51. Compare Fiss, Against Settlement, 93 Yale L.J. 1073, 1078-82 (1984) (expressing concerns for the adequacy of representation in settlements).

[181] 415 U.S. at 57.

[182] Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668, 680 (1986).

[183] Devine v. White, 697 F.2d 421, 438-39 (D.C. Cir. 1983) (Edwards, J.). But see Alexander v. Gardner-Denver Co.,

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[184] 415 U.S. at 57-58.

inappropriate for claims related to constitutional rights was sound. In constitutional litigation generally, the Court exercises relatively independent review of the facts found below.[185] Arbitration, though, leaves fact determinations in the hands of the arbitrator and disables intensive fact review.

Perhaps, then, judicial fact-finding should always be preserved for the enforcement of constitutional rights, even when resort to arbitration appears to be truly voluntary. I think such a limitation could sweep too broadly. For example, it might be best to arbitrate some prisoner's grievances instead of flooding the federal courts with their lawsuits. Yet prisoners have proved astute at converting everything into constitutional claims.[186] Thus, although the presence of a colorable constitutional claim identifies situations where courts are likely to treat federal court enforcement as mandatory, no categorical distinction seems appropriate.

The ACUS disfavors voluntary arbitration where precedent is to be set or where maintaining established norms is of "special importance."[187] Under present law, it is difficult to be much more specific than that.[188] A somewhat more adventuresome formulation would authorize arbitration for all law-applying, and might make an exception where constitutional rights are implicated.

Continued from previous page

[183] 415 U.S. 36, 57 (1974): "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."

[185] See generally Monaghan, supra note 57.

[186] E.g., Parratt v. Taylor, 451 U.S. 527 (1981) (negligent loss of a hobby kit as constitutional deprivation of property); overruled, Daniels v. Williams, 106 S. Ct. 662, 665 (1986).

[187] 1 CFR § 305.86-3 B.5.(b). The recommendation on mandatory arbitration contains a similar limitation for precedential effect, and requires an ascertainable norm for decision, but does not explicitly refer to cases involving the need to maintain norms. Id. C.8.

[188] See, e.g., Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238, 1244 (White, J., concurring) (substantial doubt and controversy often surround the waivability of federal court enforcement of particular public rights).

C. Limiting Judicial Review.

Judicial review of arbitration has always been more limited than review of administrative adjudication. Here I consider the minimum level that should be preserved. Thomas suggests that the courts will review at least the facial consistency of an arbitral award with statutory criteria and constitutional norms. The ACUS recommendation aids such review by calling for a brief statement of the basis of an award. Courts could perform these inquiries without straining the criteria of the Arbitration Act and without probing the factual basis of awards, which would destroy the informality that accounts for the virtues of arbitration.

Courts often read statutes that appear to preclude all review to permit constitutional inquiry.[189] In that way, they avoid reaching troubling issues about the power of Congress to insulate administrative action completely. Nevertheless, some functions are unreviewable. Like arbitration programs, these functions often feature broad agency discretion, needs for expertise, informality, and expedition, a large volume of potentially appealable actions, and the presence of other methods of preventing abuses of discretion.[190]

In general, the courts seem most likely to reach issues that concern the overall structure and validity of a statutory scheme, rather than its application to particular facts. Thus, the Court recently considered whether arbitration of Medicare claims denies procedural due process.[191] A companion case, United States v. Erika, Inc.,[192] found that no judicial review of particular awards was authorized. The Court noted that the preclusion did not extend to initial determinations of entitlement to participate in the Medicare program, but only to the processing of particular claims. So limited, the preclusion prevented "the overloading of the courts with trivial matters."[193]

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[189] E.g., Johnson v. Robison, 415 U.S. 361 (1974); Bartlett v. Bowen, --- F.2d --- (D.C. Cir. March 17, 1987) (limitation on judicial review in Medicare Act does not apply to constitutional challenges to Act).

[190] Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion, 82 Harv. L. Rev. 366 (1968).

[191] Schweiker v. McClure, 456 U.S. 188 (1982); see § IV infra.

[192] 456 U.S. 201 (1982).

Since the ACUS does not recommend arbitration for elaborating public law norms, most arbitrations should be free of substantial constitutional issues. Therefore, "retail" review for misconduct and for inconsistency with statutory standards can probably be placed in the agencies. Here the important goal is to have an outside check on the arbitrator's action.[194] If the courts are ordinarily willing to defer to interpretations of statutes by agencies which are administering them, there seems equal reason to defer to an agency that is reviewing an arbitrator.

The ACUS recommendation would allow parties to consent to arbitration under a substantial justice standard. The absence of standards for an arbitrator's decision may trouble the courts, because the check of judicial review would be less effective.[195] In light of the recommended limitations on the use of arbitration, which would exclude it from situations involving the generation of precedent, the maintenance of important public rights, or the presence of third party effects, the recognition of a role for standardless arbitration should be acceptable. No interference with core functions of the courts would occur. The courts have recognized that some decisions cannot be confined by meaningful standards. For example, highly discretionary executive functions are often unreviewable in court.[196]

IV. DUE PROCESS.

In Schweiker v. McClure,[197] a unanimous Court upheld the decision of disputed Medicare claims by private insurance carriers, without a right of appeal. The program in question is a voluntary one that supplements basic Medicare by covering most of the cost of certain medical services. It is financed by federal appropriations and premiums from participants. As the Court noted, the program resembles subsidized private insurance on a massive scale: 27 million participants, $10 billion in annual benefits, and 158 million claims in one year.

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[193] 456 U.S. at 210 n.13, quoting the legislative history. The Court did not, however, reach issues concerning any constitutional right to review. Id. at 211 n.14.

[194] Thus, determinations of the arbitrability of particular issues might also be shifted from the courts to the agencies when the government is not a party.

[195] Review for misconduct or corruption of the arbitrator would be available, but not review for excess of authority.

[196] See generally Heckler v. Chaney, 105 S.Ct. 1649 (1985).

[197] 456 U.S. 188 (1982).

Congress authorizes HHS to contract with private insurers, such as Blue Cross, to administer claims payments.[198] HHS pays administrative costs and specifies the claims process. The carrier makes an initial determination whether a claim is a reasonable charge for covered services. On denial, the claimant receives a de novo redetermination on a written appeal to a new decider. Disputes over $100 then receive an oral hearing before a carrier employee not involved in the prior decisions, with a written decision based on the record, but with no further appeal.

The Court began by rejecting a due process charge of bias against the deciders. It could find no financial interest in the carriers or their employees in denying claims. The Court then turned to the argument that due process required additional administrative or judicial review by a government officer. Applying the familiar criteria of Mathews v. Eldridge,[199] the Court assumed that the weight of the private interest was "considerable." The weight of the government's interest in efficiency was unclear, but the Court assumed that providing ALJ review would not be "unduly burdensome." Focusing on the risk of erroneous decision and the value of additional process, the Court stressed HHS requirements that deciders be both qualified to conduct hearings on medical matters and thoroughly familiar with the program and its governing law and policy. The Court perceived no deficiencies in this, nor any need that deciders be attorneys.

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[198] 42 U.S.C. § 1395u.

[199] 424 U.S. 319, 335 (1976): [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Voluntary arbitration should ordinarily satisfy due process criteria. In general, there is no better guarantee of fairness than a party's consent to a particular procedure, if the alternatives are also acceptable. (Here, the alternative would be ordinary administrative process.) Granted, somewhere there are limits to what we will allow a citizen to bargain away for the benefits of expeditious decision. Those limits should not be tested by the ACUS recommendation, which disfavors arbitration for decision of important public rights.

Consent of a different kind attends some arbitration. As in McClure or Thomas, there is voluntary participation in the federal program, but not assent to arbitral techniques. Here one should be circumspect in relaxing inquiry into procedural fairness. The doctrine of unconstitutional conditions, checkered as its history may be, sets limits to the government's power to bargain for rights with benefits.[200] Thus, in McClure it was significant that the underlying entitlement to participate in Medicare was not subject to arbitration, unlike the amount of particular claims.

Under the Eldridge formulation, the acceptability of arbitration depends on the importance of the individual's interest in the program's benefits. The ACUS recommends mandatory arbitration only for disputes between private parties, not for claims against the government. Since McClure involves *de facto* claims on the public purse, the recommendation seems unnecessarily cautious in this respect. It could be reformulated to invoke the Eldridge calculus.

In regard to the accuracy of process and the need for additional safeguards, an important consideration is whether the arbitral scheme gives the parties a role in selecting the decider. Recall Judge Friendly's point that assurances of neutrality reduce the need for other procedural safeguards."[201] McClure shows that the Court does not regard agency deciders as necessarily more fair or reliable than private ones, as long as indicia of bias or interest are absent and assurances of competency are present.

The fairness of arbitration is in part a function of the specificity of the governing standard. A standard should be specific enough to meet the primary needs of the parties, the arbitrator, and the reviewing entities. The parties need enough information to exercise meaningful consent to the use of arbitration and to present their cases. The arbitrators need enough guidance to make awards that will be consistent with each other. The reviewing entities must be able to judge the facial validity of awards. Consider the standard involved in Thomas: arbitrators are to provide "compensation" to pesticide registrants for the use of their data.[202] This standard is very unconfining-- for example, does it mean the cost of creating the data or the value to the later registrant?[203] An agency presented with such a vague statutory directive should elaborate it through rulemaking.

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[200] See generally Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984).

[201] See text at note 71 *supra*.

In McClure, as in Eldridge, some guarantees of neutrality stem from the functions assigned to the decider. Hearings are meant to be nonadversary. The government is not represented, and the decider is charged with helping the private applicant develop his case.[204] In such an atmosphere, any incentive to favor one side probably benefits the claimant, who enjoys direct contact with the decider. The McClure Court mentioned the government's interest in avoiding overpayment of claims only in passing,[205] in the context of rejecting a bias claim based on HHS attempts to encourage carriers to detect overpayments. This suggests that agencies should avoid instructions to deciders that seem to promote bias for either side.[206]

For guarantees of decider competency, the Court seems prepared to accept practical considerations of background and training, without regard to formal affiliation or status. Whether lawyers are needed should depend on the extent to which formal rules of evidence are to be followed, and on the need for other kinds of expertise in the decider. As the Court remarked in the context of upholding the Veterans Administration's $10 fee limit for lawyers in claims proceedings, which effectively excludes them: "Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why lawyers must be available to identify possible errors in medical judgment."[207]

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[202] The Court did not reach a delegation doctrine challenge to the adequacy of this standard. 105 S.Ct. 3339-40.

[203] See Sathon, Inc. v. American Arbitration Ass'n, 20 ERC 2241 (N.D. Ill. 1984)(challenge to delegation not reached); PPG Industries, Inc. v. Stauffer Chemical Co., 637 F. Supp. 85 (D.D.C. 1986) (upholding the standard).

[204] 456 U.S. at 197 n. 11.

[205] 456 U.S. at 196 n. 9.

[206] See text at note 127 supra.

Under any particular program, the appropriateness of the arbitral process supplied depends on the nature of the participants and the issues. For example, in Gray Panthers v. Schweiker,[208] the court held that the Medicare procedure for claims under $100 failed to satisfy due process in two respects. First, notice of procedural options needed to be adapted to the capacities of elderly and infirm claimants. Second, oral hearings were necessary for claims involving issues of credibility. Still, the court emphasized that process can be geared to "the generality of cases, not the rare exceptions."[209] Therefore, if credibility disputes were rare, overall process would not need to be geared to them.

Provision for review by agency or court under the standards of the Arbitration Act is another check on the accuracy of arbitrations. It focuses on the two most important ways in which arbitration can go awry-- loss of neutrality in the decider, and an award exceeding the bounds of the ex ante expectations of the parties. And it would be difficult to provide added checks without radically formalizing the process.

The strength of the government's interest in informality varies. For example, it is large in high-volume, small-dollar contexts such as Medicare. In all the situations that fall within the ACUS recommendation, fact questions predominate. If expeditious process is available here, more resources will be left for the formal process needed for resolution of policy or formation of precedent. Insofar as the government's fiscal interest involves payment of awards as well as provision of process, however, the government's advantage is not a simple matter of minimizing procedural costs. Instead, the government should seek process that optimally balances accuracy and cost. And as Eldridge emphasizes, this choice deserves deference.

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[207] Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3194 (1985).

[208] 716 F.2d 23 (D.C. Cir. 1983).

[209] Id. at 36, quoting Eldridge, 424 U.S. at 344.

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-6

STATE DISABILITY SERVICES' PROCEDURES FOR DETERMINING AND REDETERMINING SOCIAL SECURITY CLAIMS FOR THE SOCIAL SECURITY ADMINISTRATION

by

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Disability Determination Procedure: An Overview *

I. The Multiple Procedural Levels - Four "de novo" reviews leading to the District Court

The initial step in applying for social security disability benefits (Title II or Title XVI) usually takes place at a Field Office (formerly called a District Office) of the Social Security Administration. After an application is filed there, the Field Office is responsible for determining certain preliminary matters. It is important to understand that although Field Office employees have extensive training in the overall requirements of the social security system, they generally lack specialized training in the medical aspects of the disability program. The time of initial contact at the Field Office has both benefit and administrative significance that should be noted. The beginning date for benefits may depend upon the date of application. For administrative purposes, processing time is generally calculated from the date of submission of the initial application for benefits.

If non medical requirements are met the file is then transmitted to a state disability determination service (DDS) for a disability determination. In the DDS teams of examiners and physicians, who are by training and background oriented towards the medical and vocational aspects of the disability program, make the disability determinations.

Within the state DDS system there are two adjudication levels, an initial determination, and (if a denial results and the claimant requests it within 60 days) a reconsideration of the initial determination. New evidence may be submitted at the reconsideration stage either by the claimant or through the examiner requesting more information. Such additional evidence may include a consultative medical examination (CE). The initial determination and reconsideration determinations are, however, made in the state DDS agencies by two different teams of examiner and physician. While there is a variety of administrative detail among the various state agencies, it appears to be fairly common that the more experienced state agency examiners (often at different and higher pay grades) participate in reconsideration level determinations.

At each of the initial and reconsideration stages the panel of examiner and physician is charged with making the correct decision. This is a de novo determination at each level, for indeed, a "different" case may be presented to each panel as a result of the changing content of the file. However, it is important to understand that this is primarily a paper process for initial applications. While there may be some telephone contact between the examiner and claimant, such contact is quite limited.

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* This report could not have been completed without the assistance of substantial preceding works. While specific citations and attributions have not been made, the author wishes to recognize the pervasive influence (inter alia) of Professor Mashaw's works, Mashaw, et al, Social Security Hearings and Appeals, (1978) and Bureaucratic Justice, Managing Social Security Disability Claims, (1983), as well as Dixon's earlier work, Social Security Disability and Mass Justice, (1973).

If the result continues to be adverse to a claimant, an "appeal" to an Administrative Law Judge (ALJ) within the Office of Hearings and Appeals of the Social Security Administration may be requested within 60 days. However, appeal is a misnomer, for new evidence may be submitted at the ALJ stage, including the testimony of the claimant. The ALJ is then charged with making the correct decision, thus this is also de novo review. Once again, since new evidence may be placed before the ALJ, the case may be quite different from that seen at earlier stages. Under the normal system of processing disability applications, there is no face to face contact between the claimant and anybody in the state DDS, so that the first face to face contact with a decisionmaker ordinarily takes place at the ALJ stage. The only face to face contact below the ALJ level is typically at the Social Security Field Office with personnel who lack expertise in the disability determination process.

If the claimant is dissatisfied with the result at the ALJ stage, an appeal may be taken to the Appeals Council within 60 days. 20 CFR Sections 404.968, 416.1467. Although review at that level is ordinarily based upon the material contained in the file, regulations permit "additional evidence it [the Appeals Council] believes is material" 20 CFR Sections 404.976(b), 416.1476(b) either through remand to an ALJ or directly obtaining the evidence itself "unless it will adversely affect [the claimant's] ... rights." 20 CFR Sections 404.976(b), 416.1476(b). [The evidence must relate to the period on or before the date of the ALJ decision.] The claimant may attempt to submit "new and material evidence" with the request for review. 20 CFR Sections 404.970(b), 416.1470(b). While submission of additional evidence or the addition of such evidence through Appeals Council intervention, may be infrequent, this level is also de novo review, for the Appeals Council clearly has the power to make the "correct" decision if the Appeals Council actually takes the case. If the case is remanded by the Appeals Council to the ALJ, the submission of additional evidence occurs regularly.

If the Appeals Council decision is adverse to the claimant, the claimant then has a right to file an appeal in the United States District Court within 60 days. 42 U.S.C. Sec. 405(g), see also Bowen v. City of New York, 476 U.S. ___, 54 L.W. 4536 (1986) (time not jurisdictional). Review in the District Court consists of review of the record under the substantial evidence test. However, the statute provides for a possible remand to the Secretary for additional fact finding for the addition of "new medical evidence" for which "good cause is shown for failure to incorporate" such evidence into the record. 42 U.S.C. Sec. 405(g). Strictly speaking, only in the District Court is review for the first time not de novo review. However, even in the District Court it is widely held that something akin to de novo review instead of substantial evidence review may actually take place, particularly by District Judges who have considerable expertise in disability matters. (See, "Recent Studies Relevant to the Disability Hearings and Appeals Crisis," Dec. 20, 1975, Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives, 94th Cong., 1st Sess., p. 133, n.7. Many attorneys, as well as many DDS and SSA personnel, agree with this conclusion.)

II. Sequential Determination

After evaluation at a Social Security Field Office that a Title II claimant or Title XVI claimant meets certain eligibility tests, the disability application is referred to a state agency (DDS) to make a disability determination. At that point a five step sequential evaluation procedure is mandated by regulations. The object of that sequential evaluation is to determine whether the basic statutory disability standard is met, i.e. whether the claimant has an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months...." 42 U.S.C. Sec. 423(d)(1)(A) and Sec. 1382 c.(a)(3)(A).

Step one determines whether the claimant is engaged in "substantial gainful activity.(SGA)" If she is, disability benefits are denied. 20 CFR Sections 404.1520(b), 416.920(b)(1986). Earning more than $300 per month (or if the claimant is blind and applying for Title II benefits, $680/month (1987 figure)) are ordinarily deemed to demonstrate that a claimant is engaged in SGA. [This determination is made at the Field Offices.]

Step two determines whether the claimant has a medically severe impairment or combination of impairments. That determination is governed by the severity regulation considered by the Supreme Court in Bowen v. Yuckert, 55 LW 4735 (June 8, 1987). That decision upheld on its face the requirement that a medical impairment be severe as a condition for eligibility, although the Court expressed some doubts about the manner in which the test is applied. If the medical condition or combination of conditions is not considered severe, the disability claim is denied. No further evaluation takes place in such cases. 20 CFR Sections 404.1520(c), 416.920(c).

Step three involves a determination as to whether the impairment meets or equals one of the "listed" impairments considered by the Secretary to be so severe as to preclude substantial gainful activity. If a listing is met or equaled, the claimant is conclusively presumed to be disabled. Evaluation for such claimants stops at this point. If a listing is not met or equaled, evaluation proceeds to step four. 20 CFR Sections 404.1520(d),416.920(d); 20 CFR pt. 404, subpt. P, App. 1 (1986).

Step four involves a determination as to whether the claimant can perform work that she has performed in the past. If the claimant can perform such work, she is not disabled. 20 CFR Sections 404.1520(e), 416.920(e). If the claimant cannot perform past work, the evaluation goes to step five.

Step five involves whether the claimant is able to perform other work in the national economy in view of her age, education, and work experience. The claimant is entitled to disability benefits only if she is not able to perform other work which exists in significant numbers in the national economy, regardless of whether or not the claimant would actually be hired, and regardless of whether or not such other work is available in the community or state in which the claimant lives. 20 CFR Sections 404.1520(f), 416.920(f).

Most cases that proceed as far as the District Court stage are disputes about steps four and five. Rarely are steps one and three critical for District Court review.

III. Continuing Disability Review Cases (CDR), Personal Appearance Demonstration Projects (PAD), and Decision Review

Two other disability review procedures merit mention at this point. The first is CDR (Continuing Disability Review) which has a direct legislative relationship to the Demonstration Projects. The second type of procedure is Decision Review.

A. Continuing Disability Review

CDR involves cases in which at some time in the past a claimant had been determined eligible for disability payments under either Title II or Title XVI. The law requires that benefits be paid only to people who initially meet -- and continue to meet --all the legal and medical requirements for eligibility. Congress has mandated that all disabled beneficiaries must have their cases periodically reviewed to determine if they are still disabled and eligible for payments. These reviews were resumed in January 1986 following a moratorium that began in 1984. In certain of these cases medical improvement is expected and in others it is considered possible. A medical improvement statutory standard applies now, which generally requires that medical improvement (MI) exist before payments may be terminated. Certain cases involve no expected medicl improvement and are referred to as MINE (medical improvement not expected). Cases may also be categorized as MIP (medical improvement possible) or MIE (medical improvement expected).

During 1984 all CDRs were halted by the Secretary in anticipation of the passage of Public Law 98-460 and subsequently until the new law could be implemented. The Medical Improvement Review Standard regulations were published on December 6, 1985 and CDRs resumed. However, the moratorium of CDRs plus the slow rate with which CDRs appear to have come back through the system means that there is a substantial backlog of CDR cases. In addition, the CDR determinations performed to date involve cessation rates far below what had been anticipated. [In part this is because a decision was made to concentrate on the class actions and individually named court cases relating to medical improvement which were remanded to SSA for review and also to include other CDR categories such as MINE (Medical Improvement Not Expected) cases to test out the new CDR procedures. Among other benefits this enabled Hearing Officers to have an opportunity to become familiar with the new hearing process.]

CDR decisions involve the same type of team decision as in an initial determination, ie., disability examiner and physician determinations. Public Law 97-455 mandated, however, for Title II cases that a face to face evidentiary hearing be conducted by the Secretary or the State Agency at the reconsideration level for CDR [the Secretary expanded this requirement to Title XVI medical cessation cases by regulation].

B. Demonstration Projects

Some of the considerations behind Congressional establishment of a right to a hearing in CDR cases also led to mandated experiments with "personal appearance interviews" in demonstration projects. A House Committee Report subsequent to enactment of the CDR "hearing" requirement, reports that part of the purpose of this face-to-face "CDR hearing" requirement was to give the state agencies experience with such face to face procedures before anticipated implementation of a requirement of face to face interviews at the initial determination level. [House Ways and Means Committee Report, March 14, 1984, H.98th Cong. 2nd Sess. 98-618, p. 16.]

That House Committee report endorsed the concept of instituting face-to-face pre denial "interviews" at the initial State level, and of abolishing the reconsideration stage for initial claims as well as for CDR cases. However, such changes were understood as substantial changes to the existing system, and it was explained that as a result the Secretary was required to establish demonstration face-to-face evidentiary projects and to report the experience of such projects to Congress.

The statute eventually passed, Public Law 98-460, mandated such personal appearance demonstration projects in a minimum of five states for Title II or XVI cessation of continuing benefits, as well as in five states for initial disability claims. The report to Congress was due by December 31, 1986.

However, commencement of the demonstration projects was delayed for a number of reasons, to the point that all of the 10 states participating were stated by the Secretary to be actively involved by March 1, of 1987, with the final report expected by September 30, 1988.

For such personal appearance demonstration projects the proper terminology for the personal appearance is an "interview." By contrast, CDR cases involve "hearings." However, while there are some differences between the two procedures, for most intents and purposes the same type of procedure occurs. The hearing officer goes through a comprehensive set of questions relating to medical problems and functional abilities. While CDR "hearings" may be more factually complex and take somewhat longer than most "interviews," it is doubtful that a claimant could detect any difference in tone or conduct between an "interview" and a "hearing."

It should be noted that very few mandated face-to-face CDR hearings had been conducted nationwide before January of 1987 under the requirements of P.L. 97-455 primarily because of the CDR moratorium. Although SSA had conducted training from 1984 to 1986 in holding such hearings at McGeorge Law School for 300 - 400 state level hearing officers, few hearing officers actually had much opportunity to use this training until the late Spring of 1987. As of the end of July, 1987 many state level hearing officers are yet to hold their first CDR hearing or first interview within the demonstration projects. Many other hearing officers have held less than 5 hearings, and few hearing officers have held more than 15. Obviously any data is quite limited, and must be viewed with considerable skepticism at this point. In particular, since it is possible that the more complicated cases, those cases requiring additional factual development (through CEs for example), will likely come through the system at a later time period, early results may be biased towards simpler, less expensive cases to process. For this reason, it is strongly urged that any policy changes and statutory changes await completion of the personal appearance demonstration projects and final data analysis.

C. Decision Review

Another significant category of cases in the disability system at this time are decision review cases. These are primarily CDR cases involving named plaintiffs or unnamed class members of federal court cases that date back to and before the 1984 moratorium. Approximately 40,000 cases fall into this category. All necessitate significant administrative burdens for the state DDS as well as SSA, and involve procedures somewhat different from normal CDR review. This category of cases was not a primary focus of this investigation. However, one should minimize neither the volume of such cases nor their complexity added on to an otherwise complicated, multi-leveled administrative scheme. By June, 1987, 24,000 of these cases had been processed by SSA, and it was anticipated that the great bulk would be completed by the end of fiscal year 1987.

IV. Reconsideration

A. A Historical Overview

Reconsideration in the disability determination process is a creation of the Secretary, rather than a statutory requirement. Indeed, the first statutory mention of reconsideration relates to the 1983 amendments (Public Law 97-455) mandating a face-to-face reconsideration hearing prior to medically terminating benefits through CDRs. Reconsideration was made mandatory by 1959 regulations. Prior to that time the applicant had the option of having his claim considered by the state agency or going directly to a hearing. It is likely that it was begun to cope with the extraordinary case volume that confronted SSA and the state agencies.

At one point in time it was clear that reconsideration was a "significant step," by which is meant a step that involved significant numbers of reversals. Over time the reversal rate has changed considerably, although it is still true that the total number of reversals remains substantial. Reversal rates at reconsideration have gone down from 33 percent to under 15 percent from 1970 to 1987. The historical data is reported in the following table:

Reconsideration Determinations on Initial Disability Claims and Allowance Rates for Workers, Widows(ers), and Children, Fiscal Years 1970-87.

Fiscal year		Decisions	Allowances (%)	
1970#	approx.	100,000	33	
1972#	"	150,000	36	
1974#	"	200,000	34	
1975#	"	225,000	33	
1976#	"	230,000	29	
1977#	"	210,000	28	
1978#	"	260,000	19	
1979#	"	285,000	17	
1980#	"	303,000	15	) same yr
1980*		405,163	15	) data diff.
1981*		437,953	13	
1982		370,506	11	
1983		357,763	13	
1984		372,315	15	
1985		378,952	14	
1986		380,425	17	
1987 (10/86-2/87)		194,956	14	

#. Source is Bellmon Report, Number of Disability Insurance Determinations, excludes applications solely for SSI disability benefits, p. 9, numbers of cases are estimated. Remaining data in table includes Title II, Title XVI and Titles II/XVI concurrent disability claims.
* Includes continuing disability review (CDR) cases. Data not available separately for initial and CDR cases.

Criticism has been voiced that reconsideration today does little more than add to delay in the process and constitutes an obstacle to ALJ review, if only by tiring out some claimants. Drops in reversal rates at reconsideration are cited as evidence for the lack of utility of reconsideration. Obviously, determining the reasons for change in reconsideration allowances over time becomes a relevant question.

1. The Impact of Shortening Time for Seeking Reconsideration

One minor factor in this drop in allowances at reconsideration is the shortening of time for requesting reconsideration. At one time a request for both an ALJ hearing and for reconsideration could be made within six months of notice of the determination for title II cases. To accelerate the process, partly because most reconsideration requests came within 60 days, the 1976 amendments to the Social Security Act shortened this period to 60 days for requesting ALJ hearings. (Public Law 94-202, effective Feb. 29, 1976) Texts of House and Senate Committee reports indicate an intention to extend this shortened time frame to both ALJ hearing requests and requests for reconsideration (although the latter was provided for only by regulations). The Secretary proceeded to implement this policy and extended it to title XVI reconsiderations as well, so that the time frames for Title II and Title XVI were similar. (SSR 78-15) However, as a by product the time period during which a medical condition could worsen so as to make the claimant disabled was also cut down. With a shortened time frame prior to reconsideration, fewer claimants would be expected to have significant changes in medical conditions before final determination at the reconsideration stage. Some part of that "time-worsening" effect upon medical condition might be expected to appear later at the ALJ stage in the form of more allowances. Indeed, the ALJ reversal rate did go up as reconsideration allowances declined.

However, this factor by no means explains the size of the drop over time, although it does coincide quite closely with the sharp drop in reversal rate in the data beginning with 1978.

2. Addition of SSI Claimants to the DDS system

Another factor, whose impact on the drop in reconsideration allowances is far harder to estimate, is the addition of the SSI program under the 1972 Social Security Amendments which "federalized" the state programs for the needy aged, blind and disabled into Title XVI. Payments under that program began in January of 1974 through grandfathering in of disabled or blind persons already on the state programs before December 1973. Very significant increases in DDS and SSA case loads occurred during the middle 1970s. By 1978 the first significant drop in reconsideration allowance rates was apparent in Title II program data. By that time as well, the number of Title II reconsideration requests had more than doubled from 1970, while the number of initial claims for Title II benefits had gone up nearly 40 percent. This must be seen as a very substantial increase in case load for what might be called the largest adjudication system in the world. (albeit an administrative system)

That addition had impacts besides case load upon the state DDS agencies. At times differences between the typical Title II claimant (by definition a worker who has acquired enough quarters of covered employment to become eligible) and Title XVI claimants were described as great. Differences as simple as punctuality in keeping CE appointments impacted upon the system. Thus the administrative process was encumbered by not only significantly more claimants, but also by claimants of different types who may have required special types of treatment at various points.

3. State and Private Incentives to Force Disability Applications

Another factor must be considered as well. Once the SSA disability system was expanded to encompass SSI, each of the states acquired distinct fiscal incentives in seeing that as many of their general assistance welfare recipients or AFDC welfare recipients as possible qualified for the federal SSI program. Title XVI eligibility shifted such recipients from the state welfare rolls (or for AFDC recipients, from a matching federal-state fund program) to federal rolls. While a state could choose to supplement Title XVI SSI payments, such supplements were not required and were unlikely to be as large as a state general assistance payment.

Many states do appear to have decided to attempt to shift as many of such persons as possible to the SSI rolls. That has taken the form of policy or statutory requirements that a state welfare applicant (AFDC included) apply for SSI and/or DI, sometimes on an annual basis, and sometimes with a requirement that such persons carry their application through the reconsideration stage, or even through the ALJ stage. The fact that some states pay attorneys' fees if the attorneys are successful in having a client placed upon the SSI disability rolls is one measure of state economic interest.

Not only do such requirements swell the number of annual initial applications, reconsideration requests, and ALJ hearing requests, it is possible that they increase the number of applications that are not meritorious. For example, a state AFDC policy that all pregnant recipients must apply for federal disability because of pregnancy almost certainly involves a clear denial case. Pregnancy doesn't last more than 12 months, and few women are disabled by pregnancy alone. Of course, certain such "forced" applicants do properly qualify for the federal disability program, and thus attention to the concerns of such claimants is important.

The natural result of more "unmeritorious claims" would be a drop in the allowance rates, both at initial and at reconsideration. Such drops did occur. At the ALJ level, however, other factors may mask the reality of the situation. For example close cases may also be a significant proportion of the cases that go up to the ALJ. It is possible that ALJ reversal rates might actually increase overall as a result of a larger proportion of "frivolous" cases. More allowances may result from close cases now appearing to be clear winners by comparison. As long as the shifting of close cases to clear winners exceeds the proportion of "frivolous" cases, the net impact may raise ALJ allowance rates. Obviously this "counterintuitive possibility" is raised in the absence of confirmatory data, and it may not obtain at all.

Conversely, the state DDS agencies may like such "frivolous" cases, for although they do cost some time and money to process, such cases may be easier and quicker to process than many other cases. Quality review accuracy measures may improve while processing time per case may be lowered from such "frivolous" cases.[1]

Ultimately, the question is whether the additional administrative costs placed on the federal budget and administrative burden upon the state DDS-SSA system are fully justified for state welfare mandated applications to disability. Is there for example, a solution that recognizes that many such claimants are disability eligible, but many other claimants have no reason to be in the system even as applicants? Can such "frivolous" cases be identified and removed from the system at an early stage? Can repeated applications be curtailed in a fair and equitable way, perhaps by requiring demonstration of a worsened medical condition prior to accepting a second filing from an applicant? None of these questions have easy answers.

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[1] Note: The Auditor General of California has issued a report indicating that the California DDS staff substituted cases in the random case selections for SSA quality review, thereby understating the number of errors. We cannot overlook internal pressures on DDS agencies to look good by whatever measures are chosen to monitor administrative efficiency by SSA. Such alleged practices include delaying the official application date at the Field Office until a file is "complete," so that when the file is transferred to the DDS processing can go forward quickly.

Another similarly situated group of claimants are those persons forced to apply for federal disability by private disability insurance carriers. Such private insurance policies typically provide that benefits are reduced dollar for dollar for benefits paid by the federal Title II or Title XVI program. Private insurance carriers thus have clear financial incentives for also forcing appeals to reconsideration, ALJ and stages beyond. As a result they have established teams of personnel whose job is solely to see that their "clients" present the best case possible for federal disability payments. However, many such private insurance policies pay if the claimant cannot perform a past job or other comparable salaried job with an employer. That is a totally different standard from the federal disability requirement. This is yet another source of "frivolous" cases which may have entered the administrative system as private disability coverage widened. While some rules do exist on technical denials, perhaps different methods of discouraging "frivolous" applications might be considered for such types of cases.

However, it must be noted that the current intake process at the Field Office does not attempt to collect information on who, if anyone, has suggested that a claimant apply for federal disability. While many applicants volunteer information that they were required to apply, there is really no accurate measure of the size of the claimant group forced by state requirements or private insurance to apply to the federal system. The author was told frequently by DDS and SSA personnel that claims of this type seem to have risen substantially in recent years. No one could cite any hard data to support this assertion, presumably because such data has not been collected.

B. Reconsideration Today

What is reconsideration producing in the way of "changes in decision" when largely a "paper process?" National data regarding quality review of the results at reconsideration level sheds some light on this question. In Fiscal Year 1986 at the reconsideration level 17 per cent of decisions were reversed. (380,536 reconsiderations, 64,592 allowances).

Quality review examined in detail 2,422 cases that involved a reversal at the reconsideration level. SSA quality review data then broke the reasons down for reversing a decision. Each of three reasons for reversal explain slightly over 10 percent of the reversed cases sampled. These reasons include an increase in severity (12.1 percent), discovery of an additional impairment (11.3 percent) and different medical evaluation (14.4 percent). Obviously each of these reasons explain significant numbers of the reversals nationwide. However, the most significant single reason for reversal was additional documentation, either of the primary or secondary impairment (49.1 percent). Nearly half of all reversals are attributed to this single explanation. In some social security regions nearly 58 percent of reversals can be attributed to this single reason.

It is hard, thus, to conclude that nothing is achieved by a second look at a file by a the DDS even if that look consists primarily of paper review. Nationally approximately 32,000 allowances were made in FY 86 based upon the reconsideration level examiner seeking additional documentation of something already partially reflected in the file. As a comparative measure of case load, that single category of reconsideration "allowances" is approximately equal to 80 percent of the total caseload of the Appeals Council and 16 percent of the caseload of ALJ dispositions in FY 86.

Were reconsideration abolished without another system established to cope with this "second look" at a claimants's file aspect, the case load impact upon ALJs would be serious. Indeed, if one categorizes the reasons of identification of additional impairment and a different medical evaluation as both factual supplements to the case file, nearly 3/4 of all reconsiderations that result in allowances involve factual supplements were achieved in a relatively short time. Such cases equal approximately 120 percent of the Appeals Council current case load, and 23 percent of the ALJ caseload.

The waterfall gross case statistics for FY 86 are incorporated herein at appendix 1 (Table 4). The key figures for reconsiderations are the combination of allowance rates of 17 percent (83 percent denial) and the difference between the cases that are not taken from reconsideration to the ALJ stage. In FY 1986 there were 380,536 reconsiderations, including 315,746 affirmations of the initial denial, but only 204,332 ALJ dispositions. From one view the appeal rate of 65 percent of such affirmations appears substantial, but the flip side is that 35 percent do not appeal. Complete elimination of the reconsideration stage (with no other change in the system of appeals) might very well nearly double the caseload at the ALJ stage. (Approximately an 86 percent increase in ALJ caseload)

To the extent that data supplied by SSA regarding Component Workload Unit Cost (Appendix 2) are accurate, this involves shifting decisions from state agencies that had unit costs per decision of approximately $290 per case to the ALJ level where decisions cost approximately $900 per case. (These are approximates, and include subfigures of $299.98 for DI reconsiderations, $291.65 for SSI reconsiderations, and $275.78 for concurrent SSI/DI reconsiderations. The comparable ALJ level figures are respectively $871.02, $836.70, and $913.48) The additional annual expected administrative costs would be approximately $50,000,000 (after subtracting all reconsideration costs). For comparative purposes, the total administrative unit costs attributed to reconsideration in FY 1986 were approximately $115,000,000, and to ALJ determinations of DI, DI/SSI, and SSI Hearings approximately $179,000,000. Elimination of reconsideration has a potential for increasing the administrative costs to the system by a factor of approximately 17 percent.

However, other impacts of complete elimination of reconsideration must be considered as well. Reconsideration determinations while the subject of complaints for taking too long, do have one distinct advantage over ALJ determinations. They are made in a far shorter time frame. Thus for the cases that are currently reversed at reconsideration level in approximately two months (for Title II cases, mean time Oct. 1986-Apr. 1987 61.3 days, see appendix 3) one would be trading off for a system that currently has an average processing time of something on the order of six months after filing of the notice of appeal (172 days Av. processing time, FY 1986 (see Appendix 4). [The average time for filing a notice of appeal is 39 days, and thus this step actually adds another seven to seven and a half months onto the process. However, time also runs during the period after receipt of the initial determination before requesting reconsideration. The current system thus has two periods of dead time, each involving a wait on the claimant's decision to appeal.]

Framing the picture from the claimant's perspective: reconsideration provides one chance in six of a positive payment decision within two months; an appeal to the ALJ stage provides one chance in two of a positive payment decision within six months. Would most applicants desire a complete elimination of an early payment decision opportunity in favor of the alternative later payment decision system? That seems doubtful. Many claimants complain payments already take too long a time to come.

Another factor is the impact of reconsideration on case development. It is frequently the case that additional information is included in the file at the reconsideration level. Even if a denial results, that information may become part of the data employed later to justify an ALJ allowance (or denial). The value of such subsequent impact is nearly impossible to measure, and indeed may be marginal in many cases. (And irrelevant to cases not appealed beyond the reconsideration stage.)

An additional factor to be considered from the claimant's perspective is the reduction in net benefits attributed to legal representation (although not all representation generates fees, such as representation by legal aid). At current rates of legal (and non legal) representation at the ALJ stage (estimated to be as high as 85 percent), the net amount paid on an allowance for those who are allowed at the ALJ stage can be reduced by the withholding of up to 25 percent of past due benefits for legal fees. The ultimate result is that the beneficiary loses approximately 2 to 3 months of benefits through payment of her attorney. Since very few claimants are represented at the reconsideration stage, attorneys fees apply to few allowances at the reconsideration stage (and then represent no more than 25 percent of a far shorter payment stream, perhaps equivalent to a single month's payment). [Of course, without attorneys these claimants lost below.]

Thus one impact of complete elimination of reconsideration would be to shift certain payments from beneficiaries to payments to attorneys for those cases that would have been otherwise allowed at reconsideration. Such a payment shift on a per case basis represents more than the unit cost of ALJ processing: thus this would not be a de minimus financial impact. Since the program is designed for claimant beneficiaries, this shift in resources appears to have little ready justification. Only substantial increases in "efficiency" or "accuracy" or "acceptability" factors could justify such a shift as a matter of policy.

In addition, some percentage of the claimants who apply for reconsideration who fail to appeal to an ALJ (approximately 100,000 in FY 1986) might have been found disabled by an ALJ. Were the 50 percent reversal rate at the ALJ stage to remain constant, the cost of additional disability payments to such claimants could dwarf the extra administrative costs. Of course, if these extra ALJ allowances are correct decisions, the purposes of the disability system would be well served. But the potential fiscal impact cannot be ignored. If the ALJ reversal rate remained consistent at about 50 percent, based upon the number of FY 1986 cases, approximately 23,000 additional allowances might have been expected, representing something over $1,010,000,000 in overall program cash benefit costs. This does not include medicare benefits, or other non cash benefits and administrative expenses which would add an additional 52 percent cost figure, or somewhat less than $1.5 billion dollars.

These are not annual costs, but the present value of lifetime cash benefits. This is based upon 23,000 allowances at total present value figure for December 31, 1985 of $43,921 for Title II cases. Payments under Title XVI are at a much lower level and thus the figures overstate the net expected costs, but they indicate the order of magnitude. The additional annual cash benefit costs for the first year could be well over $100,000,000. The figure of 23,000 additional allowances is derived by applying the 50 percent ALJ reversal rate to all FY 1986 reconsideration requests and assuming that all such requests for reconsideration were instead requests for an ALJ hearing. This probably overstates the likely result, for some persons who requested reconsideration in FY 1986 might have decided not to appeal to an ALJ. Of course it is also possible that some persons who failed to request a reconsideration before the same DDS that had already rejected them, might request an ALJ hearing, although the number of such persons is likely to be low.

Another potential impact of complete elimination of reconsideration should also be considered, the impact upon the current system of legal representation. Three principal types of attorneys appear to typify representation of clients at the ALJ stage. There are relatively few attorneys who can be considered specialty practitioners in the Social Security disability area. They normally operate on high volume with relatively small margins. Average fees per case are the area of $1,500 (FY 1985 Hearings and Appeals Council Average Fee request $1,525.55; average fee allowance, $1,358.86). These fees come from a percentage of past due benefits won for clients. Such practice is not very profitable. As a result, such attorneys constitute a small segment of the bar anyplace in the United States. In large geographic areas of the United States, however, these are the only attorneys willing or able to take such cases.

There are also legal aid offices around the country who represent disability clients. Such offices usually operate on very low budgets derived from charities or governmental support. Staffing is limited. In many cases former legal aid attorneys become the specialty practitioners in the disability area (as sometimes do former disability claims examiners).

The last type of legal representation is performed by attorneys who have only isolated contact with the social security system. Such attorneys may take a case or two a decade as a favor to a friend or because an old client or client's relative has a disability problem. Such attorneys are very reluctant to take additional cases because the system is complex both legally and medically, requires considerable expenditure of time for a novice to accomplish anything, and is considered unprofitable. Such representation is considered pro bono representation. Often the major result of such an attorney's first social security case is a firm resolve to take no more such cases even if the representation achieved a successful result. Disability examiners who have contact with such attorneys express the opinion that they seldom add much for the client. However, since there are few contacts with attorneys at the

DDS level, such observations should not be given undue weight. It may well be the case that at the ALJ stage most such "novice" attorneys do a good job for their clients.

The capacity of the private bar or of legal aid to double the rate of representation of clients, particularly in the short run, is quite doubtful, absent financial incentives that are unlikely to occur. Indeed, there are some indications the financial constraints on disability attorneys are being pulled in exactly the opposite direction.

One must also recall that a significant proportion (approximately 15 percent) of representation at the ALJ stage comes from various non-lawyers, such as paralegals, as well as representatives from various non-profit agencies. It is difficult to estimate the degree to which these entities could substantially expand their representation. However, the possibility of such expansion, perhaps associated with federal financing under the model of the Legal Assistance Corporation, for disability representation, should not be ruled out as an option.

In short, elimination of the entire reconsideration stage would almost certainly raise processing costs to the system, likely increase payments to lawyers to the detriment of some claimants who would have been allowed at reconsideration, and would, at least in the short run, present significant case load problems for the persons representing disability claimants at the ALJ level. Given assumptions that the ALJ staff is unlikely to immediately increase in any way proportionate to the anticipated increase in appeals, it is likely that case processing times at the ALJ stage will increase, perhaps to the point of limiting the advantage of time saving through eliminating reconsideration. State DDS agencies may perceive that such a change would create serious personnel problems, requiring reductions in staff, and result in less flexibility to respond to changing case loads as peaks and valleys occur in applications. The need to move staff around to respond to administrative necessity is a significant concern in many DDS agencies.

V. The Value of Face to Face Procedures at the DDS level: History

Reconsideration as well as initial consideration of a disability claim at the DDS level has largely been a matter of paper review, with isolated telephone contact with claimants. The only person "representing" the state DDS they may have seen in person would be the CE physician if a CE is involved.

With that in mind, SSA has conducted various experiments with face to face procedures at the DDS level. Some of the more significant results from those studies are reported below. What can be said about such experiments is that the results are at the most suggestive, but ultimately inconclusive. In more than a few situations the data either was incomplete, or considered so unreliable that no final report of the experiment was produced. An SSA staff person who has perhaps the longest exposure to these experiments over time states that the experiments do appear to raise allowance rates at the DDS level, but have little or no impact upon appeal rates or ALJ allowances. On the other hand, the fact that allowance rates do tend to go up at the DDS level, and appear to do so in each experiment, suggests some utility to face-to-face "interviews."

A. The Bellmon Report with Particular Emphasis on Its Examination of Face to Face Procedures

The Bellmon report (Implementation of Section 304(g) of Public Law 96-265, Social Security Disability Amendments of 1980" (Jan. 1982) sheds some light on the utility of a face to face interview in the disability system. For purposes of the Bellmon report hypothetical paper reviews of files were conducted with the ALJ and Appeals Council receiving transcripts of the actual ALJ hearings in the cases. No decisions were changed as a result of these reviews. The executive summary of the project reported:

> "Results for the review suggest that the in-person appearance of claimants at ALJ hearings may make a difference. The ALJ hearing is the first time that the claimant appears before a decisionmaker. As part of this review, all information related to the claimant's in-person appearance was removed from a special subsample of case folders and these folders were then distributed to other ALJs, the Appeals Council, or OA, for readjudication based on the case record. The original ALJ allowance rate of more than 60 percent dropped to 46 percent when the in-person information was removed from the case." (p. ii)

Additional Evidence

The Bellmon Report also suggested that the existence of additional medical evidence after the DDS decision significantly affects ALJ allowance rates. "The ALJ allowance rate dropped from 46 percent to 31 percent when all evidence added after the final DDS decision was deleted from folders in the sample."

Different Standards

The Bellmon report also indicated substantial differences in allowance rates based upon the entity making the decision and the standards being applied:

> "The ALJs allowed 64 percent of the cases. The Appeals Council, applying ALJ standards, allowed 48 percent. OA [Office of Assessment within SSA], applying DDS standards, allowed only 13 percent."

Different Decisionmakers

The Bellmon report examined for 3,600 cases the results of the Appeals Council determinations, the ALJ determinations and the OA determinations. ALJ's operate as sole decisionmakers. For most intents and purposes, so does the Appeals Council, although a panel of several decisionmakers ordinarily become involved in decisions that involve changes. The Bellmon report does not indicate whether a panel approach was used by the Appeals Council for these cases. The OA determinations involved a panel in each case, for a two person team of a disability examiner and a physician on the Medical Consultant Staff made each OA determination. Thus the OA determinations replicated the method of determination made at reconsideration, while Appeals Council and ALJ determinations are similar in method.

Agreement between Appeals Council and ALJ

The Bellmon report indicated that on the sample cases, ALJ allowance rates were 64 percent, and the Appeals Council 48 percent. That masks some of the differences between these decisionmakers, for the Appeals Council denied 37 percent of the cases which the ALJs allowed, and allowed 21 percent of cases the ALJs denied. (Bellmon Report, p. 14). [OA resulted in a far lower overall allowance rate of

13 percent. Nevertheless, confidence in accuracy is not bolstered by examining these in detail. OA would have allowed 4 percent of cases that the ALJs denied, and 7 percent of cases which the Appeals Council would have denied.]

Lack of Consistency in Reasons

The Bellmon report further examined the reasons given by ALJs and the Appeals Council for denying or allowing eligibility. "A detailed examination of the cases on which both groups agreed, however, shows that the Council agreed with the ALJs as to the basis for an allowance or denial much less frequently than it agreed on whether the case should be allowed or denied. The Council agreed that a case should be allowed because the claimant met or equaled the Medical Listings in 41 percent of the cases that the ALJs allowed on this basis, and agreed with an ALJ allowance based on vocational rules in 38 percent of the cases."(Bellmon Report, p. 23) [Overall the Council agreed with the ALJs on allowance decisions roughly 50 percent of the time.]

B. DARE (Disability Appeals Reform Experiments): Face to Face Part (DARE 3)

In some ways the DARE experiments are the most interesting ones conducted by SSA, particularly DARE 3. The DARE projects examined the effect of different procedures at various stages: (1) testing mandated CEs in every case at reconsideration if CEs had not before been conducted, a RFC assessment, and expanded notices of determinations (DARE 1); (2) testing DARE 1 procedures with hearing cases informally remanded to the DDS (DARE 2); and (3) testing face to face reconsideration by an interviewer at various stages (DARE 3). Examination of the preliminary data on DARE 3, no final report having been published, is worthwhile. It should be noted, however, that SSA considered the statistical validity of the study questionable, and that explained the decision not to publish final results.

The DARE 3 Experiments were conducted on a sample of cases at reconsideration stage to study the impact of face to face meetings with disability examiners on ultimate disability determinations for a sample of cases from 4 states during the period May 1981 to May 1982. Unlike the Bellmon study, these cases involve actual determinations with impact upon real world allowances. While the other DARE Experiments appear to have demonstrated few impacts upon allowance rates, DARE 3 did appear to increase the rate of reconsideration allowances on a fairly consistent basis across the 4 states, particularly whenever the face to face meeting took place "Late." Early interviews were either immediate interviews by the DDS or DO (District Office, now called Field Offices), while late interviews were defined as prior to a denial determination or reconsideration determination. For late interviews before DDS examiners a net increase of allowances of five to ten percent appeared in each of the test states. (See appendix 5, Dare 3, table 3.1 Reconsideration allowance rates by State and treatment group, is a table from a December 22, 1982 report to the Director of Office of Disability Programs regarding these experiments.)

The DARE 3 allowance rates were:

State	Group	Allowance Rates	Percent above Control
Ariz.	Total	18.8	3.1
	DDS Early	16.9	1.2
	DDS Late	26.6	10.9
	DO Early	13.6	- 2.1
	DO Late	21.4	5.7
	Control	15.7	
Conn.	Total	19.2	4.5
	DDS Early	17.9	3.2
	DDS Late	24.9	10.2
	DO Early	15.3	0.6
	DO Late	24.3	9.6
	Control	14.7	
Geor.	Total	10.8	2.7
	DDS Early	12.7	4.6
	DDS Late	13.0	4.9
	DO Early	9.7	1.6
	DO Late	10.8	2.7
	Control	8.1	
Oreg.	Total	13.9	1.3
	DDS Early	15.7	3.1
	DDS Late	19.1	6.5
	DO Early	16.6	4.0
	DO Late	13.4	0.8
	Control	12.6	

On the other hand, the rate of filings of appeals of denials in DARE 3 from reconsideration to the ALJ stage demonstrated little consistent pattern, certainly no substantial decline in appeals. A summary of data is attached as appendix 6.

DARE 3 data indicated an actual increase in the rate of filing appeals in one state of from 3 to 12 percent (average 6 percent), and drops in three states (two states about one percent drop, and one state about a 5 percent drop). These differences are not statistically significant by treatment group (I.E. DDS late, or early, etc.), but are significantly different by state. (Other DARE 3 data suggested that increased appeal rates are associated with securing additional medical evidence and (to a lesser extent) the securing of additional vocational evidence. It is not known whether these relationships are due to the fact that additional evidence was secured, or to the difference in case characteristics between those cases in which such evidence was added and those in which it was not.)

DARE 3 also examined the impact of these face to face meetings upon ALJ determinations on appealed cases. Small but statistically insignificant decreases (by types of treatment) in allowances at the ALJ stage resulted. The limited raw data suggests that ALJs allowed from one to seven percent fewer claims, and may modestly suggest that fewer meritorious cases were going up on appeal, but state to state variations were far more important. The data is reported in Appendix 7.

It should be noted that DARE 3 data suggested, however, that increases in ALJ allowances occurred in those cases in which additional medical evidence was secured below. If the fact of securing additional medical evidence is taken as a surrogate for the disability examiner determining that these were close cases (or alternatively as an indication to the claimant that there is more hope if the case is continued), there may be a modest case made for the "appropriateness" of an increased ALJ allowance rate in such close cases. The data is reported in Appendix 8.

The overall allowance rates (after reconsideration and ALJ appeals) for cases in the DARE 3 experiment were not significantly higher as a group than for the control cases. The overall allowance rates were within a range of 0.2 percent lower to 3.1 percent higher. Somewhat more variation appeared within certain treatment categories, particularly DDS Late, from 7.4 percent higher to 0.4 percent lower. The data is reported in Appendix 9.

However, the fact that in three of four states the allowance rates for DDS late cases exceeded the allowance rates for the control cases after reconsideration and ALJ determinations is modestly promising, in that some procedural changes do make a difference in outcome.

Conclusion regarding DARE 3

In many ways the last reported result, that the overall allowance rates did not substantially change, is the most surprising result of the DARE 3 experiments. The fact that overall allowance rates did not change may testify to the efficiency of the current system. However, looking at ultimate allowance rates doesn't say anything about the case mix. It may be impossible to define a "correct" disability decision or the "correct" allowance rates. We do not know in any ultimate sense the number of truly disabled claimants who drop out of the application process because of frustration with that process, while disproportionate numbers of "not really disabled" claimants persevere.

Within such reservations, we may speculate that there may be more "correct" decisions in the DARE 3 experiment sample cases than in the control group cases. In other words, those cases which went up on appeal may have been proper close cases, ones in which close judgment calls were involved. These cases may have been appealed because the claimants were better educated regarding DDS and SSA standards and procedures. Conversely, improper cases may not have gone up on appeal as much. There may have been more improper ALJ determinations in the control case sample than in "experimental" cases. If it were possible to know the truth of the matter, the ultimate results both at the DDS level and the ALJ level may have been that more "correct" decisions were made.

The problem is that we cannot tell. Data from such experiments cannot be put on the same level of data from physics laboratory experiments. Large numbers of people are involved in any such experiment, both on the claimant side and on the DDS side. Hawthorne experimental effects cannot be ignored. Nor can we ignore potential hostility to such experiments from DDS personnel who may like the way the system has been working. Both these and many other potential reasons suggest that the results of such experiments must be viewed with caution.

C. A Pilot CDR Study

Very limited results have been reported on an early 1980s project involving 1100 Title II, XVI and concurrent cases of CDR reconsideration hearings in Texas, New Mexico and California. A memo by Louis B. Hays, Acting Deputy to Deputy Commissioner for Programs and Policy, states that in the study cases, "The DDSs favorably reconsidered their own initial determinations in an average of approximately 18 percent of these cases, thus reducing the number of cases in which hearings were required. Of the cases sent to the Disability Hearings Units (DHUs) for hearings, approximately 24 percent were favorably decided by the hearing officers on the basis of testimony and additional evidence presented at the hearing with an accuracy rate of about 96 percent ...."(Sept. 8, 1983 memo., p.2) The memo also stated, " While cumulative data for a final report are still being collected and analyzed, the available information suggests that the face-to-face procedure allows for a fuller, more meaningful reconsideration process."

It is understood that some doubts exist about the validity of data from this experiment, and it is also understood that no final "formal" report has been prepared. However, comparison of these allowance rates with the overall (very low) allowance rates at reconsideration for the 1981-83 period indicate that the experimental project rates were substantially higher, and perhaps, thus, closer to the "norm" for reconsideration. A presentation to the Subcommittee on Oversight of Government Affairs, United States Senate, 98th Cong., First Session, June 8, 1983, indicated an overall reversal rate for the pilot was 38 percent. Whatever the validity of detailed data from this experiment, it also generally testifies to the utility of face-to-face procedures.

VI. Current Face to Face Proceedings at the DDS Level

During the course of this project the author was able to visit four different state DDS agencies (Missouri, Michigan, Wisconsin and Maryland) (and observed a face-to-face hearing in Illinois as well as having had an opportunity to talk to Illinois personnel). State agency personnel were most cooperative at every level to any request for assistance and information (however burdensome and unreasonable) made by the author. Significant parts of these visits included interviews with the state agency hearing officers with experience at conducting either PAD project interviews or CDR hearings. In addition, the author was permitted to observe several interviews and hearings conducted by different examiners and hearing officers (with the permission of the claimants obtained beforehand).

Similar cooperation with the author was given on an open and willing basis by SSA agency personnel from Baltimore. Such personnel deserve particular commendation. In several instances site visits were coordinated with trips by experienced SSA personnel to the state DDS agencies. In connection with the visit to Maryland, the author was also able to interview various SSA personnel at Social Security headquarters in Baltimore. A very preliminary opportunity was also given to examine the PAD (Personal Appearance Demonstration project) interview reports from New Mexico (which by early July had completed its sample of PAD cases).

A. Field Observations

Perhaps the most striking impression the the author had after visiting the small sample of state DDS agencies was the degree of variation between the different state agencies. For example, on the Missouri DDS visit, it was learned that Missouri has considerable experience with face to face proceedings, including home visits, that go back over a decade and a half. That experience and the belief by Missouri DDS personnel in the utility of face to face proceedings is likely to color results. Conversely, in another state (not in the PAD project) claims examiners who were not themselves conducting face to face interviews and who had no prior exposure to such interviews were highly dubious of the value of such interviews. Such examiners were fearful of loss of objectivity. In that same state, however, fellow claims examiners who did, by accident, have such face to face experience, were most enthusiastic about both the idea and the utility of such interviews. In another state, not one visited, a PAD project was not implemented (and thus shifted to another state), in part, because the state DDS had recruited claims examiners on criteria that excluded talent for face to face hearings as a job qualification, and also apparently promised that no such direct claimant contact would attach to the job. Only by a site visit could one possibly understand such variations from state to state, and indeed, within the same state DDS agency.

It is also the case that in each of the PAD site visits SSA personnel from Baltimore also discovered significant information regarding implementation of the PAD projects that suggest that ultimate data from the different state projects will not be fully and exactly comparable. It is important to understand that these variations occurred despite the best efforts of SSA and local DDS agencies to produce "identical laboratory experiments" in the PAD states. Still, variations in treatment of files between different states have occurred. With luck, these variations in file treatment will have little impact on final data. But this experience, plus the fact of different geographic and institutional situations in the different PAD states, only highlights the difficulty in drawing conclusions from such demonstration projects.

With those caveats, certain overall impressions can still be drawn at even this early stage. Based on interviews with the hearing officers who conducted PAD interviews or CDR hearings in the sites visited, strong consensus existed about certain points.

First, the experience of *every single hearing officer interviewed* was that claimants liked the opportunity for an interview, and virtually each claimant invited to an interview accepted the offer and actually came. New Mexico data coincides regarding the high rate of attendance.

Second, again to a person, *every single hearing officer interviewed* reported that the claimants who came to an interview seemed satisfied with the interview experience. Since the decision is not rendered at the time of the interview, this does not mean that claimants will not appeal an adverse result. The claimant does, however, hope that post interview action will be favorable. Of course the likelihood of adverse results may be fairly clear in many interviews. For example, in one of the hearings observed by the author, the claimant clearly understood the restrictive criteria for disability for the federal system by the end of the interview, and recognized that there were jobs in the economy that he could still perform. The claimant commented, "Perhaps I really should consider retirement, I don't really want to do some of those kinds of jobs." At the end of the interview, this particular claimant was polite and expressed satisfaction with the interview.

Third, virtually in every case claimants were polite, and expressed willingness to cooperate with the hearing officer. (Some fears exist about the potential for violence of certain claimants. No violence or threats of violence had taken place in the experience of any of the hearing officers interviewed.) No feelings were expressed by hearing officers that claimants were intentionally trying to hide any medical information so as to be able to surprise the ALJ with new medical information.

Fourth, almost never were claimants represented by anyone at the interviews actually conducted. In very few cases in each state an attorney had actually attended (two or three times overall per group of hearing officers per state at the time of the site visit). The attorney was usually judged by the hearing officers to have contributed little, and appeared more to be observing the interview. In only one case did the hearing officer attribute much utility to the attorney's presence, that being through ability to draw information out of the claimant. It should be noted that the expressions of utility of legal representation is based upon a miniscule number of times that an attorney actually attended such an interview. In two particular cases (in different states), an attorney failed to attend the hearing although the claimant expected the attorney to come. In each of these cases, the claimant went forward with the interview without the attorney.

Fifth, rarely did the claimant attend with any witness. In those cases in which a witness came, the witness was usually another family member. In some of these cases the witness was useful.

Sixth, the hearings were generally about an hour in length. Some more complicated CDR interviews went as much as two hours. A few were as short as 20 minutes.

Seventh, claimants normally did come in shortly before the interview to review their file in the half hour given for such review.

Eighth, those hearing officers with significant numbers of interviews (more than five or six) uniformly reported that the interviews made a difference to them in deciding the cases. Either they reported that the interview assisted them in making an allowance decision, or else a decision to deny was strengthened by the interview.

Ninth, each of the hearing officers performing CDR reviews who had conducted a significant number of such reviews reported they were required to continue disability paymentsfor claimants they are convinced never were disabled in the first place because of the lack of any medical improvement. In most such cases the claimants had been found eligible by an ALJ. These were seen as clear ALJ errors, not just close judgments on which reasonable persons might differ.

Tenth, hearing officers frequently reported that objective evidence was seen at the personal interviews that impacted upon their determinations. Such evidence rarely was available in the paper file alone. In one case, for example, the hearing officer reported being shown a nitro patch on the chest of a cardiac claimant, as well as many other nearby marks on the chest confirming that nitro patches were routinely in use. This helped confirm the existence of chest pain. In other cases hearing officers were able to add data relating to ease of ambulation, problems relating to mental retardation, frequency of epileptic seizures, and recent worsening of medical condition impacting upon daily activities. In one interview a painter with a claim involving an apparently minor limitation with one arm appeared for the interview. Only at the interview was it learned that the hand on the other arm had been lost years before, but since that loss hadn't affected ability to work it hadn't been mentioned by the claimant or the Field Office! In another case involving "varicose veins," the fact that the claimant was a deaf mute hadn't been mentioned in the paper file. In many cases, all that the Field Office learns about, and includes in the file, is the last event that tipped the scale against ability to work.

Eleventh, hearing officer status was normally considered at a higher level than other claims examiners within the state DDS. In some, but not all, states this took the form of pay grade jumps, or transfers to different pay lines. Hearing officers were in part a self selected group, chosen from volunteers with an eye to the prior performance of the applicants. Normally, but not always, some of the claims examiners with the best performance records were selected as hearing officers. However, other skilled and highly rated claims examiners did not choose to seek "promotion" or assignment to hearing officer status.

Twelfth, claimants on the whole responded very quickly to an offer of a hearing, with requests for a hearing frequently being returned within two weeks.

B. The States Visited

1. Missouri

Missouri presents a unique example of face to face interviews, with a history of such interviews going back decades. It was guestimated that face to face interviews over the years had resulted in an additional 20 percent reversal of earlier DDS decisions. New and significant evidence was discovered in approximately 20 percent of the cases. As a result, Missouri has implemented a policy of holding as many interviews as possible, when staff time is available, in selected initial and reconsideration claims. (Attached hereto as appendix 10 are the guidelines employed for selecting such cases.) Three types of cases were frequently seen in which a personal interview has proved valuable. They include: 1) retardation, 2) mental impairment, and 3) musculoskeletal impairments. [National Data indicates that these categories represent approximately 60 percent of all recon. allowances Jan. - Dec. 86, with the addition of cardiac categories they represent nearly 75 percent of all reconsideration allowances.]

As a result of the Missouri experience with, and confidence in, selecting cases for interviews, it is suggested that the option of selective interviews at the DDS level should seriously be considered, should the costs of mandated interviews for all claimants appear excessive. It is recognized that this suggestion involves some potential due process objections. However, it is believed that such selective granting of interviews would be well within the scope of administrative discretion permitted by Mathews v. Eldridge, 425 U.S. 319 (1976) so long as appeal to an ALJ continues to exist.

The Missouri experience with selective interviews is that approximately five initial interviews per day can be conducted by an interviewer. This rate is fairly normal even when a Missouri claims examiner spends a day on the road. Missouri is a state in which the decentralized DDS offices still cover claimants from large geographic areas.

Over the years there has been much concern with security in such interviews. Potential client hostility against the hearing officer in recent mandated hearings has been curtailed by ensuring that the hearing officer had not participated in making the earlier cessation decision. Indeed, certain hearing officers described going through the file for the first time with the claimant present, demonstrating, in a very graphic way, that they had not prejudged the case. The hearing officer didn't really know what the case was about. However, actual incidents involving hostility have been very rare over the years, and none have occurred in recent time.

The Missouri hearing experiences: VERY PRELIMINARY RESULTS: USE WITH EXTREME CAUTION

Preliminary results of the Missouri CDR hearings as well as the use of screening criteria (for initial denials) are encouraging regarding the value of interviews. For example, the monthly report for June indicates that 56 allowances were made in 207 CDR cases, a 27 percent reversal rate. Without considering RAD [request additional development] time, the average time to process such a hearing case was 23.0 days, and considering RAD time, 28.1 days. It is worth noting that the reversal rate within different offices in Missouri for June ranged from 12 percent to 89 percent. The April reversal rate had been 21 percent, with offices ranging from 10 percent to 34 percent reversal rates. The average time for processing in April was 18.3 days without RAD time being considered and 23.6 days with RAD time included. In both months, these are short processing times, and demonstrate reversal rates above recent reconsideration reversal rates.

Preliminary results of the PAD cases are also promising, albeit very limited in numbers. For example, the monthly report for June indicates that 5 allowances were made in 17 cases, a 29 percent reversal rate. Without considering RAD time, the average time to process such a hearing case was 54.0 days and considering RAD time, 58.1 days. The requirement that a claimant be given notice of a hearing 25 days prior explains the different time periods involved. The reversal rate within different offices in Missouri for June ranged from 14 percent to 100 percent. The April reversal rate had been 36 percent (5 reversals of 14 cases), with offices ranging from 0 percent to 100 percent reversal rates. The average time for processing in April was 39.6 days without RAD time being considered and 45.7 days with RAD time included. Once again, in both months, after consideration of the mandated 25 day notice period, these were short processing times, and demonstrate reversal rates above recent national reconsideration reversal rates.

During the site visit it appeared that after a case has been classified as a potential cessation, and slated for transmission to the hearing unit, the case was further reviewed by a supervisor or another claims examiner. (In Missouri the hearing unit conducted both hearings and interviews.) While not a formal "reconsideration," this paper review acted as such. Certain cases were thus converted to allowances at this stage, and thus never made it to the hearing stage. This effect, similar to one observed in the pilot programs in Texas, Oklahoma, and New Mexico project conducted in 1983, must be considered in final overall evaluation of PAD projects.

Each of the Hearing Officers in Missouri happens to have a masters degree. Claims examiners who are not Hearing Officers also have substantial experience in claimant interviews.

2. Michigan

Michigan did not have a tradition of claimant interviewing so prevalent in Missouri. Thus the initial claims PAD project in Michigan may report results more "typical" of the states as a whole.

However, while the PAD in Michigan was purportedly at the initial consideration level, the reality appeared to be better described as reconsideration. After a preliminary decision to deny had been formulated in Michigan, that tentative decision was communicated to the claimant through a "we plan to deny letter." The claimant was then offered the possibility of an interview. For internal processing purposes, these cases were labeled in house as "reconsideration" cases and appeared to be treated as such. There were even some differences from office to office in terms of the precise time at which a case is passed to the Hearing Unit. In two offices, which employ a two examiner system on PAD cases, the second examiner is involved after the predecision notice is sent. In two offices, the second examiner is involved with the file before the predecision notice. In these offices should the second examiner determine that an allowance is appropriate, and a physician agree, there would not be an interview held. This same pattern of a second examiner in effect overruling the first examiner was also seen in Missouri (as well as other demonstration projects). It was estimated that approximately 10 percent of the cases "initially slated for denial" are converted to allowances during this transfer.

Michigan Conclusions: DATA SO LIMITED CONCLUSIONS VIRTUALLY IMPOSSIBLE

The very preliminary data available for the year to date (through 6/26/87) interview results, indicate that very few reversals (8 percent) resulted from an interview (7 reversals, 88 denials after interviews). A frequent report regarding an interview was that the interview focused the hearing officer on the need for particular additional medical work up such as a CT scan for brain tumor, or a breathing study for a file listed as scoliosis. In some of these cases, the result was additional development time, which showed up as nearly twice as many "no decision" demonstration project interview cases as in control cases (no interviews) (46 versus 27).

Very preliminary results on the average number of days from initial receipt to signed final decision indicate ranges in Michigan offices of between 70 days to 83 days (through 6/26/87).

While there had been few reversals as a result of the limited interviews conducted in Michigan at the time of the site visit, each such reversal involved observations at the interview that were seen as significantly aiding the hearing officer. If nothing else, the very sketchy data available regarding results emphasizes the necessity of waiting for full results before drawing conclusions after each and every case has been fully processed though the system.

3. Maryland

Maryland is not involved in the demonstration projects, but does conduct hearings for CDR cases. It was visited to give the author a sense of current practices regarding paper reconsiderations as well as an opportunity to interview hearing officers conducting mandated CDR hearings.

Very few mandated hearings had been conducted by early July 1987. Descriptions of the few hearings were consistent with those from Missouri and Michigan regarding most matters. Even though approximately half of the CDR cases involved attorneys representing claimants, attorney attendance at an interview was rare. Family members were the most frequent additional witness. In several hearings, visual observation by the hearing officer of medical condition was seen as important.

Paper reconsideration review otherwise is an apt description for the Maryland procedure for initial and reconsideration of claims. At the most brief telephone calls were made to claimants. The reconsideration allowance rate was reported at about 14 percent. The author is somewhat puzzled by the difference between that estimate and Quality Review Estimates of a 21 percent allowance rate for Maryland at reconsideration for Jan. 86-Dec. 86.

4. Illinois

Illinois is not a participant in the PAD project, but conducts CDR hearings. Unlike all of the other states visited, the Hearing Officers have conducted a significant number of decision review disability hearings. That fact may have a major impact upon the overall reversal rate. The reversal rate in the DHU (Disability Hearing Unit) is relatively high (48.7 percent (253 determinations by September 1987)). In addition, approximately 9 percent of the cases are reversed prior to transfer to the DHU by a prehearing unit.

Most claimants take advantage of coming to a hearing (less than 6 percent are no shows, and 7 percent waived the hearing). Attorneys have come to approximately 30 percent of the CDR or decision review hearings (58 of 189). Most claimants are perceived as pleased by having had the opportunity to appear.

The Hearing Officer who conducted a hearing which the author observed, was of the opinion that hearings were valuable in certain classes of cases. These include musculoskeletal, mental retardation, mental impairment and cardiac cases. For example, in cardiac cases hearings were seen as useful for the description of chest pain for nearly all such cases involve issue of claimant pain.

5. Wisconsin

Wisconsin is not a participant in the PAD project, but conducts CDR hearings. While those conducted to date have been primarily MIE cases, they have resulted in significant numbers of decision reversals (Approximately 30 percent). The Wisconsin experience with the hearing process appears similar to that of the other states visited. Most claimants did attend hearings. Most claimants are perceived as pleased by the hearing process.

There has been a relatively high rate of appearance of representatives (mostly lawyers) at such hearings (as of 7/29/87, approximately 20 percent have had representatives (38 of 191 total cases)). While the overall reversal rate was 30 percent, it was 26 percent for those without representation, and 45 percent for those who were represented.

While hard data is not readily available, it is estimated that reversals occur in approximately 7 to 10 percent of cases in the Hearing Unit without actually going to a hearing. (This is particularly impressive since Wisconsin had streamlined the transfer process to the DHU (Disability Hearing Unit) so that the transfer occurred without further staff review after a request for an appeal is filed. The paper review of the Hearing Officer was enough to reverse such decisions. It should be noted, however, that additional medical development may also occur to explain these paper reversals. Subsequently, it was learned that this streamlining may have violated 20 CFR Sections 404.916 and 404.1416 and the Wisconsin process has been changed. However, the time saving effected through that process may outweigh the extra burden imposed upon the hearing unit. It is suggested that consideration be given to altering the regulations to permit what Wisconsin had been doing.)

Wisconsin Hearing Officers appeared to value the hearings just as much as did hearing officers (or interviewers) in other states visited. Hearings were seen as valuable sources of information, particularly for pain issues, as well as for discovering more subjective evidence that may be critical to certain disability determinations, especially mental impairment and mental illness cases.

Indeed, in one classic case, a CDR for a recent kidney transplant patient, it was only at the hearing that it became clear for the first time that the claimant was retarded. Although there was a very voluminous medical file on the claimant, intense review after the hearing found at the most a single, nearly illegible, scribbled comment in the medical notes by one physician that had raised the issue. In another case, a file comment regarding "hygiene problem" meant more when the hearing room had to be fumigated after the hearing. The impact of mental illness upon functioning ability was thus graphically conveyed. (Since a significant number of cases come into the system through teleclaims, these cases may not reflect any oversights at the Field Offices.)

Reconsideration reversals in Wisconsin are currently running approximately at a 20 percent rate.

The most interesting information to come out of the Wisconsin visit was discovery that during the period of the CDR moratorium Wisconsin had done an experiment on a limited basis with its hearing officers employing face to face hearings for reconsideration level determinations in selected cases. This project thus employed the skills of the recently trained Hearing Officers. Particular attention was paid to psychiatric and pain claims. The overall result was a DHU reversal rate of 37 percent. Cases involving pain and/or mental restrictions were reversed twice as frequently as cases not involving those restrictions. [That finding is somewhat comparable to national data for January 1986 - December 1986 which estimates a reversal rate averaging 30 percent at reconsideration level for cases classified by body system - mental.]

Personnel interviewed were confident that the face-to-face project had been worthwhile, i.e. produced better decisions, not only in that more reversals occurred but also in the sense of higher confidence that the final decision, allow or deny, was correct. Moreover, they were confident that case screening could be done to separate out cases in which such interviews were likely to be productive of useful information.

It appears that over a period of time Wisconsin employed different screening mechanisms for selecting cases for face to face interviews, including both different body system case selection as well as limiting geographical areas to control travel costs.

Given the limited scope of the study, the small number of cases included in the study, variations in law during the study period, all such results have to be considered as tentative. However, they appear to be strongly supportive of the Missouri experience: i.e. a policy of selective face-to-face hearings makes sense to many of the more experienced DDS claims examiners.

One minor part of the study (involving a claimant satisfaction questionnaire) deserves passing mention. Some of the respondents knew the result at reconsideration when completing this questionnaire, others did not. Ninety one percent of all respondents said they would appeal or had appealed their decision if denied. While the responses may have been made to an ambiguous question, since all had already appealed their case to the reconsideration stage, the ninety one percent figure would suggest that a high number of claimants should be expected to appeal from any face-to-face hearing determination if the decision is adverse. Moreover, such data may suggest that any change in appeal rates may take years or even decades to appear. Changes in expectations may happen slowly. High reversal rates at the ALJ stage may be expected to encourage appeals.

VII. Attorney Views on Reconsideration Determinations and Face-to-Face Proceedings at the DDS Level

Telephone interviews were held with a number of attorneys involved in disability litigation across the country. These were by no means a scientific sample of attorney sentiment but rather provide anecdotal evidence. The interviews were helpful in framing the issues. However, it must be noted that few attorneys really know very much about reconsideration. Typically, their first contact with a claimant is after rejection of a claim upon reconsideration. Their primary contact with the federal disability system is thus at the ALJ stage. A consensus did appear to exist about a number of points.

First, it is not reasonable to expect the current "system" of legal representation to begin to function at due process hearings at the DDS level.

This conclusion stems from some very practical considerations. There are simply too many DDS offices around the country to hold hearings in close enough proximity to the offices of knowledgeable attorneys to allow the attorneys to function efficiently. Travel time and waiting time considerations, plus the small payments that could be expected for representation at such an early stage, simply makes such representation at DDS hearings impossible. One attorney reported that she would consider such representation only if because of language problems or serious mental retardation or other problems, she thought the claimant couldn't cope with such an interview alone. It would require a system of routine transfer of hearings to facilities close to attorneys offices before such a system could work. (Some states do report that they already do this upon request.)

In addition, as a practical matter attorneys report that obtaining access to claimant files before they are transferred to the ALJ unit is impracticable in certain states. Missouri reports that the file is available until the hearing and photocopying of all or part of a file upon attorney request is routinely done. Other states report that photocopying is done on a limited basis, or involves a required photocopying fee. Review of a file in the half hour prior to a DDS hearing hardly permits significant representation, although files may be made available to attorneys for weeks prior to the hearing in many states. If such availability were coupled with offers to duplicate parts or all of the file to send to attorneys prior to the hearing, such difficulties could be overcome. This might very well require regulatory changes to mandate such DDS policies in states which do not currently make files as readily available.

Today, however, the current organization with a few centrally located ALJ units in a state, where access to files is more readily available, allows significant legal representation of clients at that stage, but no earlier. That is by no means the only constraint upon legal representation for claimants; it is, however, an important one.

The fact that the current system of representation cannot be expected to work readily at the DDS level without changes such as easing file availability and perhaps centralizing hearings or transferring hearings to be accessible to the attorney, while true, misses a major, related point. Many claimants are never represented by attorneys at any stage of the administrative proceeding. For such claimants, such problems with effective legal representation are irrelevant.

Nor are attorneys a comprehensive source of reliable information about claimants who drop out of the system at an early level, or who are not represented at the ALJ level. However, such attorneys do have some insight to such drop outs, for they frequently report representing clients who confess to having dropped out of the system on earlier claims. Such claimants report they just plain gave up in frustration. (One significant manner in which attorneys help in such cases is through a motion to reopen a past case, something rarely, if ever, considered sua sponte by an ALJ. DDS personnel may reopen if they make a favorable decision.) On the other hand, it isn't clear that any more reliable information is available about claimants who choose not to seek reconsideration or fail to go the ALJ stage.

For such claimants, some entirely different sort of representation at the DDS level, might offer potential benefits.

Second, although there were some doubts about the matter, most such attorneys think that DDS face-to-face interviews are worth trying. Concern was expressed by one attorney about the apparent lack of discretion involved in the conduct of such interviews; "The interviewer just filled out the form." However, there were also reports that legal aid offices told their clients, "Go to the interview, they won't try to trick you." In one state a legal aid office is reported to have said, "If you write reversals, you will see us, if not, you won't." In other words, it legal representatives begin to see reconsideration as a significant stage where their participation might significantly affect the outcome, they might then go to reconsideration "interviews."

Third, strong consensus existed that it was important to preserve the present ALJ level, substantially as it functions today. [Factors of judicial independence, qualification level, and broader discretion were frequently mentioned as important.]

Fourth, concerns were expressed about the conduct of such face-to-face interviews. Privacy concerns were frequently mentioned (don't hold sensitive hearings out in the middle of a large open office complex) and a fear that short time limits would be imposed. (It should be noted that no such problems existed at any of the sites visited during this study, and no current reports of such problems have emerged.)

Fifth , attorneys believed that they did add significantly to the case development at the ALJ level. What is particularly impressive is the consensus that appears to exist about the work up time needed prior to an ALJ hearing for a disability claimant. Average times of 12 to 14 hours of pre ALJ hearing work ups were reported for attorneys who were familiar with the disability system. If one assumes that such attorneys both accurately report their time and allocate such time in a cost effective manner, the real cost of such representation approximates or exceeds the current federal unit cost for holding an ALJ hearing.

VIII. Summary Tentative Recommendations

1. Given the complexity of the Disability System, any changes should be slowly and carefully instituted with an eye towards minimizing potential harm to the system. (Least Harm Principle)

2. Face to face procedures appear quite promising. Full implementation of face to face proceedings, however, for all initial &/or reconsideration stages should be delayed until a final report on the current experimental projects is submitted.

3. At that point, should costs appear to militate against full face to face procedures for all claimants, strong consideration should be given to selective face to face proceedings - holding such interviews only for cases in which either the file, medical condition, or sense of the disability examiner is that such a personal interview may be of significant assistance to the ultimate determination.

4. Should the recommendation such as in 3 above be adopted, consideration should be given to implementing pilot projects on a state by state basis looking to the phased in implementation of such face to face hearings across the country employing current hearing unit staff.

5. Variations between state DDS agencies should considered to be a normal state of affairs. Unless an unlikely policy decision were made to federalize the state DDS agencies, legislative, regulatory, and administrative actions must anticipate and consider potential state by state variations, including unknown variations.

6. There seems little possibility that due process "hearings" or "interviews" at the state DDS level can adequately substitute for federal "ALJ" hearings without significant alterations to the system. Moving the ALJ hearing level to the DDS level does not appear to be a realistic, immediate alternative.

7. It appears that there is substantial room for adding elements to the DDS reconsideration level with a potential for higher benefits at a lower cost than complete elimination of reconsideration would be likely to achieve. However, it is not that clear that "the formal reconsideration level" is all that different from initial consideration leading to "predecision notices" and subsequent transfers to a second team (claims examiner and physician) for making the final determination.

8. The record should not be closed at any point before a hearing stage at which claimants are likely to be represented by attorneys. At the moment, this is the ALJ level. Should the decision be made to provide only one due process hearing at the reconsideration level in the state DDS, unless attorneys actually represent claimants at such hearings [which they are not now doing] such a change must be

understood as a major impairment of the rights of future claimants. Everything else being held equal, this would be seen as, and probably would be, a significant tilt in the system against claimants. For such a tilt not to occur, significant changes would be required such as transfer of hearings to be close to attorney offices, increased file availability to attorneys, routine photocopying of files, or something even more radical such as an entirely different manner of representing claimants at the DDS level.

9. Close scrutiny must be given to any measures of efficiency and accuracy employed by SSA to monitor the state DDS agencies. The conversion to a national data base currently underway by SSA may assist in producing more comparable, accurate measures.

10. However, measures of processing time that do not consider time spent on requests for additional development (RAD) (such as a CE, or otherwise obtaining records for the claims examiner-physician team, or for the ALJ) should not be the primary measures of efficiency. RAD time should be treated separately at all levels of file handling for otherwise efficiency measures of state DDSs and ALJs will penalize requests for appropriate additional information.

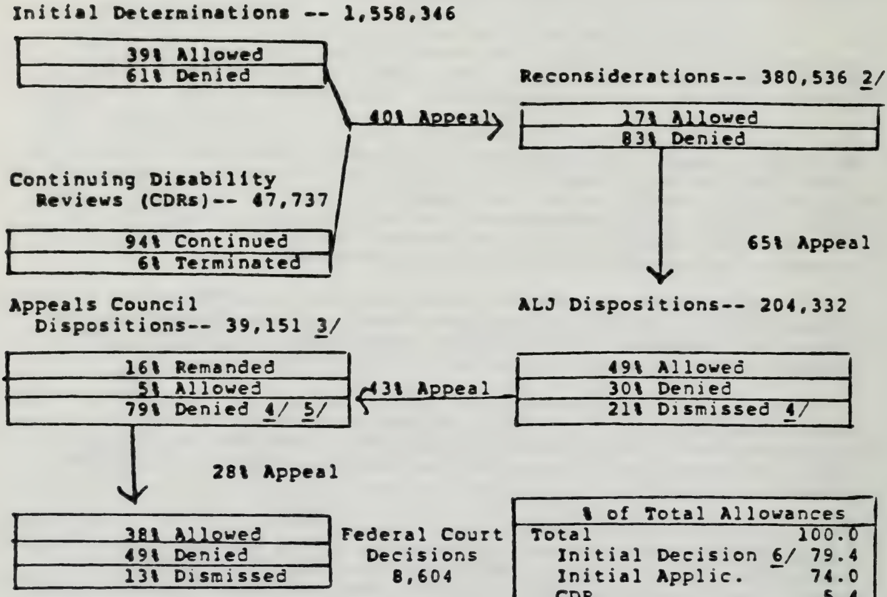
11. Thought should be given to collecting data on reference sources of claimants - i.e. were they sent over by a welfare agency or private disability insurance carrier. Only after such data is developed can policy judgments be made about appropriate responses.

12. If face to face hearings are instituted across the country as any significant part of the initial and reconsideration levels (restructured or substantially as is), decentralization of state DDS units, at least into hearing units, appears necessary to minimize travel costs.

13. Nationwide mandating of face-to-face hearings or interviews will impose substantial personnel burdens upon state DDS agencies. Neither talent for, nor desire to conduct face to face interviews, were considered when hiring claims examiners in the past. It takes several years before a claims examiner really knows the job. Thus the fact that selected claims examiners were trained to be hearing officers at McGeorge Law School both illustrates the desire of SSA and DDS for properly trained personnel, and also the type of training necessary. This cannot happen overnight without careful planning and training.

TABLE 4.—DISABILITY DETERMINATIONS AND APPEALS, FISCAL YEAR 1986

Title II, Title XVI and Concurrent Title II and XVI Decisions For Disability Claims by Workers, Widows, Widowers and Disabled Adult Children 1/


Initial Determinations -- 1,558,346
39% Allowed
61% Denied
40% Appeal
Reconsiderations-- 380,536 2/
17% Allowed
83% Denied
Continuing Disability Reviews (CDRs)-- 47,737
94% Continued
6% Terminated
65% Appeal
Appeals Council Dispositions-- 39,151 3/
ALJ Dispositions-- 204,332
16% Remanded
5% Allowed
79% Denied 4/ 5/
43% Appeal
49% Allowed
30% Denied
21% Dismissed 4/
28% Appeal
38% Allowed
49% Denied
13% Dismissed
Federal Court Decisions 8,604

% of Total Allowances	
Total	100.0
Initial Decision 6/	79.4
Initial Applic.	74.0
CDR	5.4
Reconsiderations	7.8
ALJs	12.1
Appeals Council	0.2
Federal Court	0.4

1/ The data relate to workloads processed at the various levels in FY 86, but include some cases where the initial level decision was made in a prior period. The data include determinations on initial applications as well as continuing disability reviews (both periodic reviews and medical diary cases).

2/ Title II only. Title XVI and concurrent Title II/XVI cessation cases go directly to an ALJ hearing.

3/ Includes ALJ decisions cases not appealed further by the claimant but reviewed by the Appeals Council on its "own-motion" authority.

4/ Includes periodic review cases in which benefits were reinstated under Secretary Heckler's suspension of the continuing disability review process in April 1984.

5/ Includes dismissals, denials of request for review, and affirmations of denial.

6/ Initial determinations plus CDRs.

Part C

COMPONENT WORKLOAD UNIT COST

Workload	FY 1984			FY 1985			FY 1986		
	Count	Dollars	Unit Cost	Count	Dollars	Unit Cost	Count	Dollars	Unit Cost
Office of Hearings and Appeals 1/									
RSI Hearings Request	7,446	4,390,755	589.68	10,126	7,924,636	782.60	9,829	8,302,629	844.71
DI Hearings Request	188,791	105,245,885	557.47	104,612	78,152,897	747.07	90,881	79,159,092	871.02
DI/SSI Hearings Request	81,628	48,824,326	598.13	72,708	58,156,706	799.87	65,535	59,864,674	913.48
SSI Hearings Request	54,165	30,695,171	566.70	53,978	41,304,974	765.22	48,458	40,544,611	836.70
RSI Reviews Before Council	1,477	502,506	340.22	2,098	961,226	458.16	2,859	1,504,343	526.18
DI Reviews Before Council	50,504	10,901,194	215.85	29,179	8,913,608	305.48	18,383	8,292,784	451.11
DI/SSI Reviews Before Council	21,791	5,014,975	230.14	21,123	6,909,650	327.11	13,216	6,345,193	480.11
SSI Reviews Before Council	12,150	3,268,145	268.98	13,134	4,453,021	339.05	8,609	4,299,780	499.45
Disability Determination Service 2/ **State Agencies**									
DI Initial Disability Deter.	625,822	175,945,491	281.14	605,249	194,459,092	321.29	642,392	227,036,886	353.42
SSI Blind & Disabled Deter.	488,986	135,407,171	276.91	501,486	160,893,548	320.83	583,706	206,207,658	353.27
DI/SSI Initial Disability Deter.	415,225	114,396,557	275.50	410,382	128,141,855	312.25	495,334	167,012,645	337.17
DI Reconsiderations	199,926	49,626,217	248.22	163,590	50,870,213	310.96	155,880	46,760,855	299.98
SSI Reconsiderations	102,013	23,423,776	229.62	108,336	28,491,981	263.00	115,961	33,819,608	291.65
DI/SSI Reconsiderations	120,968	24,548,734	202.94	122,764	28,985,617	236.11	126,128	34,783,751	275.78

1/ For workload definitions, refer to the Documentation Handbook for FY 1986, pgs. 65-71.
2/ For workload definitions, refer to the Documentation Handbook for FY 1986, pgs. 143-147.

Appendix 2

Appendix 3

Title II Reconsideration: Mean Processing Time by State and Social Security region for all months October 1986-April 1987 (Source Social Security Administration)

State	Number of Cases	Mean Processing Time in days
Alabama	3821	52.3
Alaska	229	71.2
Arizona	1766	60.4
Arkansas	2828	51.0
California	16159	65.6
Colorado	1505	72.1
Connecticut	1103	55.7
Delaware	272	63.4
D. C.	233	99.0
Florida	6615	55.1
Georgia	4889	51.1
Hawaii	281	101.8
Idaho	597	57.7
Illinois	7165	76.7
Indiana	3764	42.8
Iowa	1704	52.1
Kansas	1279	51.4
Kentucky	4299	39.8
Louisiana	6817	42.7
Maine	707	65.7
Maryland	1695	106.9
Massachusetts	2242	95.5
Michigan	8330	56.3
Minnesota	2013	59.3
Mississippi	3218	34.1
Missouri	3669	48.3
Montana	735	42.4
Nebraska	802	54.2
Nevada	650	77.5
New Hampshire	364	102.1
New Jersey	3452	86.6
New Mexico	1099	55.2
New York	10481	87.2
North Carolina	4471	44.9
North Dakota	288	48.1
Ohio	5694	67.0
Oklahoma	2946	49.6
Oregon	2036	62.0
Pennsylvania	9662	53.9
Puerto Rico	3277	135.2

State	Number of Cases	Mean Processing Time in days
Rhode Island	686	116.3
South Carolina	2797	61.1
South Dakota	343	49.3
Tennessee	2902	75.3
Texas	10882	50.1
Utah	568	68.0
Vermont	257	94.0
Virginia	3855	39.3
Washington	2986	58.3
West Virginia	3345	57.8
Wisconsin	2702	52.1
Wyoming	224	38.8
Region:		
Boston	5359	86.4
New York	17233	96.1
Philadelphia	19061	57.0
Atlanta	33012	51.0
Chicago	29668	61.4
Kansas City	7454	50.3
Dallas	24572	48.3
Denver	3663	59.5
San Francisco	18856	66.1
Seattle	5848	60.0
Summary	164726	61.3

NATIONAL SUMMARY - HEARINGS

FISCAL YEAR	ADJUSTED RECEIPTS		DISPOSITIONS		PENDING (END OF)	AVG. NO. ALJS ON DUTY 1/	AVG. SUP. STAFF RATIO 2/	AVG. DISP. PER ALJ 1/	AVG. PROCESSING TIME REC'D TO HEAR HELD	AVG. PROCESSING TIME HEAR HELD TO DISP.	AVG. PROCESSING TIME REC'D TO DISP. 3/	AVG. NO. OF CASES PENDING PER ALJ 1/	AVG. AGE OF PENDING CASES 4/	DAYS MONTH OF REC. PEND.
FY 73	72,202		68,356		36,780	420	2.2	14			174	117	N.A.	184
FY 74	121,504		80,783		77,233	478	2.7	13			164	122	N.A.	224
FY 75	154,962		121,026		111,169	591	2.9	16			262	173	219	260
FY 76	157,688		179,088		89,769	647	3.6	21			288	153	285	203
FY 76 T.Q. 5/	45,418		50,271		84,916	637	3.6	21			233	137	236	187
FY 77	193,657		186,822		91,751 6/	629	3.8	25			215	136	185	163
FY 78	196,428		215,445		74,747	657	3.9	27			179	128	133	134
FY 79	226,240		210,775		90,212	655	4.3	27			151	141	104	138
FY 80	252,023		232,599		109,636	669	4.4	30			159	169	109	152
FY 81	281,737		262,609		128,764	699	4.4	32			164	188	119	163
FY 82	320,680		296,548		152,896	754	4.7	34	121	65	174	203	124	168
FY 83	363,533		342,998		173,431	797	4.6	37	121	77	184	228	124	167
FY 84	271,809		337,459		107,781	763	4.7	37	121	77	185	144	126	157
FY 85	245,090		245,829		107,042	730	4.5	29	108	69	167	154	113	154
FY 86	230,655		220,313		117,384	703	4.6	27	115	74	172	173	109	161
FY 87	NO.	CUM.	NO.	CUM.										
October	22,575	22,575	17,561	17,561	122,398	694	4.5	26	115	71	176	180	111	165
November	19,904	42,479	15,492	33,053	126,810	693	4.6	23	116	72	178	187	116	172
December	21,388	63,867	17,557	50,610	130,641	692	4.6	26	116	75	181	193	121	179
1st Qtr.	68,273	68,273	52,415	52,415	133,242	693	4.6	26	116	75	179	196	121	177
January	18,400	86,673	17,072	69,487	134,570	683	4.6	26	120	83	194	201	126	184
February	22,695	109,368	17,075	86,562	140,190	679	4.5	26	124	83	195	212	127	190

Appendix 4

1/ FY 77 - FY 82 includes RCALJs. Beginning FY 83 ALJ average dispositions are calculated using one-fourth of a work month for each RCALJ, and adjustments for ALJs on leave. ALJ average dispositions are calculated to include the learning curve for new ALJs.

2/ Permanent Staff FY 73 - FY 78; FY 79 - FY 82 includes ORCALJ and temporary positions; beginning FY 83 includes only hearing office full-time permanent staff excluding interpreters.

3/ Median Times for FY 73 - FY 74; beginning FY 75 mean times - SSI cases not included until FY 76 transition quarter.

4/ SSI cases not included until FY 76 transition quarter.

5/ T.Q. = transition quarter which covers period June 20, 1976 - October 2, 1976.

6/ Adjusted up 2,013 cases from FY 77 due to conversion from a manual to an automated reporting system.

NOTE: Some statistics in the various categories throughout the report may be affected by temporary interruptions to the processing of certain types of cases because of various class action court orders and pending implementation of the 1984 Disability Amendments.
This data includes pending and processing times for sanction cases which began in 1983.

TABLE 3.1.--Reconsideration allowance rates by State and treatment group

		Number			Allowance rates		
State	Group	Total	Allow	Deny	Total	Allow	Deny
ARIZ	TOTAL	800	150	650	100.0	18.8	81.2
	DDS EARLY	160	27	133	100.0	16.9	83.1
	DDS LATE	154	41	113	100.0	26.6	73.4
	DO EARLY	154	21	133	100.0	13.6	86.4
	DO LATE	154	33	121	100.0	21.4	78.6
	CONTROL	178	28	150	100.0	15.7	84.3
CONN	TOTAL	1,061	204	857	100.0	19.2	80.8
	DDS EARLY	196	35	161	100.0	17.9	82.1
	DDS LATE	201	50	151	100.0	24.9	75.1
	DO EARLY	216	33	183	100.0	15.3	84.7
	DO LATE	210	51	159	100.0	24.3	75.7
	CONTROL	238	35	203	100.0	14.7	85.3
GEOG	TOTAL	3,424	370	354	100.0	10.8	89.2
	DDS EARLY	686	87	599	100.0	12.7	87.3
	DDS LATE	633	82	551	100.0	13.0	87.0
	DO EARLY	703	68	635	100.0	9.7	90.3
	DO LATE	702	76	626	100.0	10.8	89.2
	CONTROL	700	57	643	100.0	8.1	91.9
OREG	TOTAL	884	136	748	100.0	13.9	86.1
	DDS EARLY	178	28	150	100.0	15.7	84.3
	DDS LATE	168	32	136	100.0	19.1	80.9
	DO EARLY	175	29	146	100.0	16.6	83.4
	DO LATE	172	23	149	100.0	13.4	86.6
	CONTROL	191	24	167	100.0	12.6	87.4

Appendix 5

Appendix 6

DARE 3: RATE OF APPEALS TO ALJ STAGE

State	Group	Filing Rate	Percentage below Control
Ariz.	Total	57.1	0.9
	DDS Early	63.2	-5.2
	DDS Late	59.2	-1.2
	DO Early	52.6	5.4
	DO Late	52.1	5.9
	Control	58.0	
Conn.	Total	45.5	4.3
	DDS Early	44.1	5.7
	DDS Late	45.0	4.8
	DO Early	44.3	5.5
	DO Late	43.4	6.4
	Control	49.8	
Geog.	Total	57.6	1.2
	DDS Early	58.8	0
	DDS Late	54.3	4.3
	DO Early	56.1	2.7
	DO Late	59.1	-.3
	Control	58.8	
Oreg.	Total	52.0	-5.9
	DDS Early	58.7	-12.6
	DDS Late	54.4	-8.3
	DO Early	49.3	-3.2
	DO Late	52.4	-6.3
	Control	46.1	

Appendix 7

DARE 3: ALJ ALLOWANCE RATES

State	Group	Allowance Rates	Percentage below Control
Ariz.	Total	77.6	3.7
	DDS Early	73.8	7.5
	DDS Late	83.6	2.3
	DO Early	81.5	-0.2
	DO Late	67.2	14.1
	Control	81.3	
Conn.	Total	68.4	3.2
	DDS Early	56.1	15.5
	DDS Late	73.3	-1.7
	DO Early	68.5	3.1
	DO Late	72.1	-0.5
	Control	71.6	
Geog.	Total	61.9	1.6
	DDS Early	61.5	2.0
	DDS Late	62.3	1.2
	DO Early	59.3	4.2
	DO Late	62.5	1.0
	Control	63.5	
Oreg.	Total	53.3	7.0
	DDS Early	51.8	8.5
	DDS Late	46.3	14.0
	DO Early	65.2	-4.9
	DO Late	44.9	15.4
	Control	60.3	

Appendix 8

DARE 3: ALLOWANCE RATES RELATED TO SECURING ADDITIONAL MEDICAL EVIDENCE AT THE RECONSIDERATION STAGE

State	Additional Medical Evidence	Recon. Allowance Percentage	Hearing Filing Percentage	ALJ Allowance Percentage
Ariz.	Total	18.8	57.1	77.6
	Yes	20.9	58.3	79.2
	No	9.1	52.3	70.0
Conn.	Total	19.2	45.5	68.4
	Yes	21.0	48.8	69.5
	No	13.6	35.9	63.8
Geog	Total	10.8	57.6	61.9
	Yes	12.4	60.1	66.6
	No	9.1	55.0	56.4
Oreg	Total	15.4	52.0	53.3
	Yes	16.9	54.3	51.8
	No	11.0	45.8	58.1

Appendix 9

DARE 3: OVERALL ALLOWANCE RATES

State	Group	Overall Allowance Rate (ALJ & Recon.)	Percentage above Control
Ariz.	Total	52.1	-0.2
	DDS Early	53.8	1.5
	DDS Late	59.7	7.4
	DO Early	48.1	-4.2
	DO Late	46.8	-5.5
	Control	52.3	
Conn.	Total	41.7	0.5
	DDS Early	36.7	-4.5
	DDS Late	46.8	5.6
	DO Early	38.4	-2.8
	DO Late	45.2	4.0
	Control	41.2	
Geog.	Total	40.9	-0.1
	DDS Early	42.4	1.4
	DDS Late	40.6	-0.4
	DO Early	37.7	-3.3
	DO Late	42.9	1.9
	Control	41.0	
Oreg.	Total	37.1	3.1
	DDS Early	39.3	5.3
	DDS Late	37.5	3.5
	DO Early	41.1	7.1
	DO Late	33.7	-0.3
	Control	34.0	

INTEROFFICE MEMORANDUM

TO: All DDS Hearing Officers

FROM: Carol Fee, Director

DATE: February 3, 1984

SUBJECT: Non-Mandated Hearing Cases

At the meeting held in Central Office on January 30 and 31, we decided to hold hearings on cases other than mandated CDRs. The cases that we decided upon were as follows:

1. Mental impairment cases with one or more of the following criteria.
    a. Long history of psychiatric problems and probably hospitalizations.
    b. One year prior treatment for a psychiatric impairment.
    c. Sheltered workshop employees who we are proposing to deny.
    d. Cases on which we are proposing a denial and there is a court appointed guardian.
    e. People with IQ's between 60 and 80.
2. Orthopedic cases that meet either of the following on which we propose a denial.
    a. Long standing rheumatoid arthritis which is no longer active but where there has been joint deformity.
    b. Multiple back surgeries with allegations of pain where there is ongoing medical treatment.
3. Persons who have had cardiac surgery and we are proposing a denial.
4. Multiple impairment cases.
5. Medical vocational denial where the claimant is of advanced age, has a limited education and transferrable skills.
6. Any other case that the Hearing Officer in Charge determines would benefit from a hearing.

You need to talk with the appeals counselor about this criteria and encourage them to bring to the attention of the Hearing Officer in Charge any case they feel should have a hearing. You need to also make them aware of the fact that we will conduct non-mandated hearings

Appendix 10

(document not original)

as time allows and that similar cases may not always be treated in the same manner as far as hearings are concerned primarily because of time constraints.

If you have any questions, please telephone.

psh

ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-7

THE FOURTH BITE AT THE APPLE: A STUDY OF THE OPERATION AND UTILITY OF THE SOCIAL SECURITY ADMINISTRATION'S APPEALS COUNCIL

by

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January 28, 1988

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Appendix

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Attachment: Administrative Conference Recommendation 87-7

The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council

Charles H. Koch, Jr.*

and

David A. Koplow**

I. INTRODUCTION

The Appeals Council is the final administrative step for review of claims for benefits under the purview of the Social Security Administration (SSA).[1] The Appeals Council has always been a central unit in the adjudicatory bureaucracy, overviewing

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** Associate Professor of Law, Georgetown University Law Center.

This study was undertaken during the summer and fall of 1987 under the auspices of the Administrative Conference of the United States, which provided valuable support and assistance. The Administrative Conference also evaluated our report and prepared its own recommendations, adopted December 18, 1987, to be codified at 1 C.F.R. §305.87-7, and reproduced as an attachment to this report.

The authors are indebted to a number of people for their extraordinary support and assistance in this project. In addition to the sources listed in Chart 7, special appreciation is due to Jeff Lubbers of the Administrative Conference of the United States, Gil Fisher of the Social Security Administration, Bill Taylor and Burt Berkley of the Appeals Council and Eileen Sweeney of the National Senior Citizens Law Center, who were exceptionally generous with their time and attention throughout the project. In addition, our thanks go to Mariam Naini, our research assistant, and Karen Bouton, our typist.

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[1] As we note, the Appeals Council has largely eluded public scrutiny, and there are few written reports or assessments that focus upon it. Those of most value to the current authors include the following works:

J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals (1978) (A study for the National Center for Administrative Justice) [hereinafter "National Center Study"].

J. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims (1983) [hereinafter "Mashaw"].

D. Cofer, Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administrative Hearing Process (1985) [hereinafter "Cofer"].

D. Stone, The Disabled State (1984) [hereinafter "Stone"].

L. Liebman, Disability Appeals in Social Security Programs (1985) [hereinafter "Liebman"].

Secretary of Health and Human Services, Report on the Implementation of Section 304(g) of Public Law 96-265 (1982) (Known widely as the Bellmon Report in recognition of the Senator whose amendment to the Social Security Disability Amendments of 1980 resulted in the study) [hereinafter "Bellmon Rep"].

Legal Counsel for the Elderly, Disability Practice Manual for Social Security and SSI Programs (1985) [hereinafter "LCE"]; Legal Counsel for the Elderly, Disability Practice Manual for Social Security and SSI Programs, 1986-1987 Supplement (1987) [hereinafter "LCE (1987)"].

National Organization of Social Security Claimants' Representatives, Social Security Practice Guide (1986) [hereinafter "NOSSCR"].

Symposium on Federal Disability Benefit Programs, cosponsored by the Administrative Conference of the United States, the American Bar Association, the ABA Administrative Law Section, the ABA Commission on Legal Problems of the Elderly, Case Western Reserve Law School, and the Cleveland Foundation, Oct. 11-12, 1985, unofficial transcript, p. 261-99 [hereinafter "Cleveland transcript"].

(Footnote continued)

the work of an immense and diverse network of federal and state adjudicators, handling a wide variety of cases.[2]

1(continued)

Chassman & Rolston, "Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process," 65 Cornell L. Rev. 801 (1980) [hereinafter "Chassman & Rolston"].

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Billman, "Representation of Disability Claimants at the Appeals Council," 7 Social Security Forum No. 12, 4 (Dec. 1985).

Current Problems in the Social Security Hearings and Appeals Process, Hearing before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives, 99th Cong., 2d Sess. (March 18, 1986) [hereinafter "1986 Hearing"].

Social Security Disability Reviews: The Role of the Administrative Law Judge, Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate, 98th Cong. 1st Sess. (June 8, 1983) [hereinafter "1983 Hearing"].

Social Security Hearings and Appeals: Pending Problems and Proposed Solutions, Hearings before the Subcommittee on Social Security of the Committee on Ways and Means, House of Representatives, 97th Cong., 1st Sess. (Oct. 27, 1981) [hereinafter "1981 Hearing"].

Senate Finance Committee, S. Rep. No. 96-408 (Nov. 9, 1979) (accompanies H.R. 3236, "Social Security Disability Amendments of 1980", Pub. L. No. 96-265) p. 11-35, *reprinted in* U.S. Code Cong. & Admin. News, Vol. 3, p. 1277, 1290-1312 (1980) [hereinafter "Senate Finance Committee"].

Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means," WMCP 100-4, Committee on Ways and Means, U.S. House of Representatives, Mar. 6, 1987 [hereinafter "1987 Background Material"].

[2] There are several existing studies of intermediate administrative appellate bodies:

(Footnote continued)

Recently, the operation and sheer existence of the Appeals Council have become highly controversial. The Appeals Council has been called a "black hole," a "rubber stamp" and a "widget factory assembly line." Such diverse interests as SSA claimants' representatives,[3] members of Congress,[4] neutral scholars,[5] federal judges,[6] and even Reagan administration officials[7] have criticized

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Cass, *Background Report for Recommendation 83-3: Agency Review of Administrative Law Judges' Decisions, Reports and Recommendation of Administrative Conference of the United States* 115 (1983) [hereinafter "1983 ACUS Rep."].

Cass, "Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis," 66 B.U.L. Rev. 1 (1986) [hereinafter "Cass"].

Freedman, *Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards: Subparagrah 1(a) of Recommendation No. 6, 1 Reports and Recommendations of the Administrative Conference of the United States* 125 (1971) [hereinafter "Freedman Rep."].

Ellis, *Report in Support of Discretionary Review of Decisions of Presiding Officers: Subparagraph 1(b) of Recommendation No. 6, 1 Reports and Recommendations of the Administrative Conference of the United States* 155 (1971) [hereinafter "Ellis Rep."].

C. Koch, *Administrative Law and Practice* §§ 6.71-6.79 (1985) [hereinafter "Koch"].

[3] Statement of Eileen Sweeney, Staff Attorney, National Senior Citizens Law Center, 1986 Hearing, *supra* note 1, at 28 ("[S]erious consideration should be given to eliminating the Appeals Council or severely limiting its functions.")

[4] Legislation has regularly been introduced that would abolish the Appeals Council. *See, e.g.*, "Social Security Procedural Improvements Act of 1987," H.R. 2117, 100th Cong., 1st Sess., introduced by Rep. Archer, April 22, 1987.

[5] Cofer, *supra* note 1, at 190 ("The arguments are persuasive that the $18 million a year expense of the AC could be put to better use.") and at 196.

[6] *Salling v. Bowen*, 641 F. Supp. 1046, 1058-59 (W.D. Va. 1986).

the Appeals Council, questioned its mandate, and called for its abolition.

One is tempted to conclude that any institution which attracts such varied criticism from so many distinct sources must be doing something right. But is it?

The Administrative Conference of the United States, at the behest of SSA, has asked us to study this question. Below we have set out an extensive discussion of the operation of the Appeals Council, its relationship to the rest of the adjudicatory bureaucracy and the courts, and our recommendations for improvements.

We have been materially aided, throughout this study, by an extremely high level of cooperation from the Appeals Council itself, from other components of SSA, and from outside commentators. We have found these sources to be frank, constructive and generous with their time.[8] Any errors or omissions, of course, remain our responsibility.

What we have observed is that the Appeals Council is composed of talented and dedicated individuals, pursuing in anonymity a set of diverse tasks which we consider to be simultaneously both exceedingly important and virtually impossible. The magnitude of the current caseload, and the Appeals Council's efforts to dispatch it with diligence and compassion, defy effective management. Although the purposes of the Appeals Council are profound, and the capabilities of its current members are impressive, we find that the institution, as it currently functions, is unsatisfactory; it is not effectively achieving its goals, nor is there any real prospect for its ability to perform materially better in the future.

Accordingly, we recommend comprehensive modifications in the

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7 Donald Lambo, "Ritualism in Social Security," The Commercial Appeal, April 16, 1981.

8 Although our numerous sources spoke quite freely with us, and generally without restrictive attribution rules, we have generally elected here not to quote them directly or cite them by name. In an already heavily-footnoted article, citation of individual interviews would excessively burden the text.

The list of people we interviewed in connection with this study is appended as chart 7. Needless to say, inclusion on that list does not signify agreement with our findings or support for our conclusions.

objectives, composition and operation of the Appeals Council. We conclude, at the most fundamental level, that the mission of the Appeals Council ought to be altered -- from its current focus on "processing the cases" for accuracy and consistency, to a more long-range focus on using the review mechanism as a tool for developing system-wide improvements in the operation of the SSA adjudicatory bureaucracy as a whole. Accompanying modifications ought thereafter to be made in the size of the Appeals Council, the qualifications of its members and their relationship to the other segments of the claims network.

We have organized this report into three basic sections: Background, Goals, and Findings and Recommendations.

The Background section itself contains three subsections. The first provides an overview of federal disability law, surveying the two types of claimants' cases that together constitute over 95% of the Appeals Council's docket. The second subsection outlines the SSA claims adjudication process, explicating the sequence of bureaucratic steps through which a claimant passes before, and after, presentation to the Appeals Council. The third and most important of these introductory subsections is a description of the authority, organization and operation of the Appeals Council and its related offices, elaborating the precise standards and procedures through which cases are processed.

The Goals section next identifies a sequence of six institutional objectives that have been advanced for the Appeals Council. Different people have identified different goals, or possible goals, for the organization, and we have attempted here to parse out the overlapping and partially-conflicting imperatives facing the SSA bureaucracy in general and the Appeals Council in particular. We then evaluate the success of the institution in meeting -- or at least pursuing -- these goals, and we conclude that the overwhelming crush of cases (currently running at close to 50,000 cases per year for the 20 members of the Appeals Council to resolve) simply precludes meaningful accomplishments on any aspect of goal structure.

Finally, in the Findings and Recommendations section, we offer some suggestions on how to defeat this "tyranny of the caseload." As noted, our primary concern is to redirect the Appeals Council from exclusive concern for the unending run of individual cases, into the mode of using its unique perspective -- it is the most important national reviewer for the disparate administrative and judicial systems -- as a perch from which to develop, promote and implement policy proposals that could streamline the claims process, making it more accurate, more uniform, more efficient and more acceptable to the public.

This is a tall order for any component of any adjudicatory bureaucracy, let alone for a small and often-ignored arm of a behemoth like SSA. But we think it can be accomplished and that with these changes, the Appeals Council can once again play a leadership role in, and make a meaningful contribution to, the Social Security Administration and the millions of claimants it serves.

One final introductory note: we have repeatedly been struck by the general lack of information available to the public regarding the internal organization and operation of the Appeals Council. Despite the importance of the Appeals Council, and despite its centrality to the SSA network as a whole, precious little has been written about the Appeals Council; most outside commentators, even those who focus on the hearings and appeals process, have chosen to devote their attention elsewhere. We discern important costs in this relative "invisibility," and we hope that this study itself, and the vetting of it through the Administrative Conference, can begin the process of restoring the prominence and the effectiveness of the Appeals Council. Respect for the members of the Appeals Council, for the claimants, and for the disability system as a whole, requires no less.

II. BACKGROUND

A. Federal Disability Programs

This report encompasses the disability provisions of two basic federal public benefits programs: Retirement, Survivors, Disability and Health Insurance (RSDHI)[9] and Supplemental Security Income (SSI).[10] Together, the disability components of these two programs account for $29 billion of annual disbursements to 7 million recipients,[11] making them the western world's largest program of income support for people unable to engage in substantial gainful activity.[12]

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[9] Certain portions of the RSDHI program are also known as Old Age, Survivors, and Disability Insurance (OASDI). These were enacted as Title II of the Social Security Act and are codified at 42 U.S.C. §§401, et. seq. (§§423 et. seq. for the disability portions). Implementing regulations are at 20 C.F.R. Part 404 (1986). The Health Insurance provisions of RSDHI are contained in Title XVIII of the Social Security Act and are now largely administered by the Health Care Financing Administration of the Department of Health and Human Services.

[10] The SSI program (also known as Title XVI of the Social Security Act) is codified at 42 U.S.C. §§1381-83c (1982). Implementing regulations are at 20 C.F.R. Part 416 (1986).

[11] Statistics on program size:

	RSDHI Disability				SSI Disability	
	Number of Recipients		Total Payments			
Year	workers	others	workers	others	Number of Recipients	Total Payments
1987(est.)	2.8m	1.3m	$17.5B	$2.4B	2.9m	$9.2B
1986	2.7m	1.3m	$17.1B	$2.4B	2.8m	$8.5B
1985	2.7m	1.2m	$16.3B	$2.4B		
1984	2.6m	1.2m	$15.4B	$2.3B		
1983	2.6m	1.2m	$15.2B	$2.4B		

Social Security Administration, 1987 Report to the Congress, 29, 31 (1987); information supplied to the authors by SSA. In 1987, 404,800 new allowances of disabled workers are expected in disability cases. SSA Report, *supra* at 29.

[12] In 1986, 417,000 workers and 341,000 of their dependents were added to the disability rolls. This was the largest number of new awards of any year in the 1980's, but was significantly below the 1975 peak, when 592,000 new awards

(Footnote continued)

1. Social Context

There is, to be sure, a wide variety of other specialized disability programs -- federal and state, public and private -- existing side-by-side in the United States today.[13] These include state Workers' Compensation programs,[14] Veterans Administration benefits,[15] private insurance companies,[16] and separate federal

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12(continued)
were made to disabled workers alone. 50 Social Security Bulletin No. 5, p. 10 (May, 1987). For a comparison of social insurance programs (covering disability as well as other support devices) in other nations, see Social Security Administration, Social Security Programs Throughout the World (1985). See also Stone, supra note 1, passim (US was relatively late to enter industrialized states' process of defining disability and granting benefits.)

[13] For comparisons among various categories of disability programs, See Bloch, supra note 1, passim (discussing RSDHI, SSI, Veterans' benefits, federal civil service benefits, and black lung benefits); Swansburg, "The Relationship Between Pain and Disability Benefits: A Literature Survey," Background paper prepared for Commission on the Evaluation of Pain, October 1985 (comparing RSDHI, SSI, Veterans' benefits, workers' compensation, and private insurance programs); "Social Security Programs in the United States, 1987," 50 Social Security Bulletin, No. 4, p. 5-66 (Apr. 1987) (describing RSDHI, SSI, unemployment, workers compensation, and numerous other programs); Johnson, "Disability, Income Support, and Social Insurance," in Disability Policies and Government Programs 87-130 (E. Berkowitz ed. 1979).

[14] Workers' Compensation programs are defined and administered by state governments, and there is substantial variation among them. In general, they provide wage-loss compensation for partial or total disabilities arising during the course of employment. The disability may be permanent or temporary, but historically, rehabilitation, rather than an expectation of long-term receipt of benefits, was stressed as the rationale for the program. Swansburg, supra note 13, at 20-29; Price, "Workers' Compensation: Coverage, Benefits and Costs, 1983," 49 Social Security Bulletin No. 2, p. 5-11 (Feb. 1986).

[15] The Veteran's Administration (VA) manages two disability compensation programs: for service-connected partial or total disability, and for non-service-connected total

(Footnote continued)

programs dedicated to "black lung" victims,[17] retired railroad workers,[18] etc.[19] RSDHI and SSI, however, are unique in terms both of social importance and of the volume of administrative burdens for SSA in general and for the Appeals Council in particular.

Federal disability law is as complex as it is consequential, and part of that complexity is due to the piecemeal pattern in which the legislation for these two programs was enacted.[20]

15(continued) disability. In addition to cash benefits, the VA provides medical treatment, rehabilitation services and other programs. Swansburg, supra note 13, at 14-19; Bloch, supra note 1, at 319-424.

[16] Private insurance carriers offer an array of individual or group disability insurance policies. These vary widely in their terms, cost and coverage. Swansburg, supra note 13, at 30-37; C. Soule, Disability Income Insurance: The Unique Risk, passim (1984).

[17] Title IV of the Federal Coal Mine Health and Safety Act of 1969 (The Black Lung Benefits Act), 30 U.S.C. §§901-45, provides federal benefits to coal miners who become totally disabled by pneumoconiosis, or black lung disease, as a result of inhaling coal dust in mines. The program was originally administered by SSA, but has been transferred to the Department of Labor, effective with applications filed in 1973. Bloch, supra note 1, at 500-89.

[18] The Railroad Retirement Act, 45 U.S.C. §§201-31u, established a federal pension program for retired and disabled railroad employees. It is administered by the Railroad Retirement Board. Bloch, supra note 1, at 19-25; 20 C.F.R. Part 404, Subpart O (1986).

[19] Prior to January 1, 1984, federal employees were exempt from most of the RSDHI program but were eligible for disability benefits under the Civil Service retirement program. Newer employees are now included in SSA programs. Bloch, supra note 1, at 427-96.

[20] Liebman, "The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates," 89 Harvard L. Rev. No. 5, p. 833, 834 (1976) identifies three costs of the disjointed political process that has generated disability law: difficulty for the public in comprehending the system and its fair application; de facto delegation of authority from

(Footnote continued)

Although the Social Security Act was passed in 1935,[21] and monthly benefit checks were regularly provided to retired workers and their survivors, it was 1956 before Congress made comparable support available for workers disabled prior to retirement age.[22] By 1958 certain benefits were also extended to the dependants of a disabled worker,[23] and in 1960, the previous age restriction (which had permitted paying benefits only to disabled workers over age 50) was lifted.[24] In 1974, the current SSI program was inaugurated, superseding prior state-run (but partially federally funded) welfare and disability programs.[25] Other significant

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20(continued)
Congress to diverse judicial and administrative bodies who make eligibility law independently and sporadically; and rigidity in the system, with resistance to comprehensive evaluation and change.

[21] 42 U.S.C. §§301 et. seq., 49 Stat. 620. Efforts to expand the act to encompass disability benefits were initiated promptly, and the gradual enlargement of the program began. For histories of the evolution of the RSDHI disability program, see Berkowitz & Fox, "The Struggle for Compromise: Social Security Disability Insurance, 1935-1986," background paper prepared for National Academy of Sciences Institute of Medicine Committee for a Study of Pain, Disability and Chronic Illness Behavior, passim (1986); Berkowitz, "The American Disability System in Historical Perspective," in Disability Policies and Government Programs 16-74 (E. Berkowitz ed. 1979); W. Achenbaum, Social Security: Visions and Revisions, passim (1986); Bloch, supra note 1, at 4-17; Senate Finance Committee, supra note 1, passim; Advisory Council on Social Security, "Permanent and Total Disability," Report to Senate Committee on Finance, Doc. No. 163, 80th Cong., 2d Sess., (May 27, 1948); M. Derthick, Policymaking for Social Security 23-27, 295-315 (1979).

[22] Social Security Amendments of 1956, Pub. L. No. 84-880, §103, 70 Stat. 807, 815-24 (1956). The 1954 amendments had provided a "freeze" for a disabled worker's earnings record, ensuring that his or her ordinary retirement pension would no longer be reduced due to having paid little or no FICA tax during a period of disability. Social Security Amendments of 1954, Pub. L. No. 83-761, 68 Stat. 1080 (1954).

[23] Social Security Amendments of 1958, Pub. L. No. 85-840, 72 Stat. 1021 (1958); Bloch, supra note 1, at 8-9.

[24] Social Security Amendments of 1960, Pub. L. No. 86-778, §§401(a), 402(a), 403(b), 74 Stat. 918, 967, 969 (1960).

legislative modifications in the disability programs occurred in 1977,[26] 1980,[27] and 1984;[28] more modest adjustments have been made almost annually, and SSA issues new implementing regulations or internal instructions with great frequency.[29]

Under the current structure, each of the two major disability programs (under RSDHI and SSI) has two eligibility requirements: one financial, one medical. A claimant must satisfy both applicable tests in order to be eligible for benefits under either

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[25] 42 U.S.C. §§1381-83c, Pub. L. No. 92-603, 86 Stat. 1465, (1972).

[26] Social Security Amendments of 1977, Pub. L. No. 95-216, §§101, 201, 331, 91 Stat. 1509, 1510, 1514, 1541 (1977). The 1977 amendments raised payroll taxes and reduced benefit levels, in order to protect the financial integrity of the RSDHI disability trust fund.

[27] Social Security Disability Amendments of 1980, Pub. L. No. 96-265, §304, 94 Stat. 441, 453 (1980). The 1980 amendments provided for more frequent and searching review of approved claims, improved work incentives, and limitations on benefit levels.

[28] Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984). The 1984 act modified many disability provisions, including those regarding assessment of medical improvements in continuing disability review cases, assessment of pain, consideration of multiple impairments, and evaluation of mental impairments. Sweeney, "The Social Security Disability Benefits Reform Act of 1984," 18 Clearinghouse Rev. 819 (Nov. 1984).

In 1986, the Employment Opportunities for Disabled Americans Act, Pub. L. No. 99-643, 100 Stat. 3574 (1986), made permanent what had been experimental SSI provisions for continuing benefits (and Medicaid eligibility) for people who engage in substantial gainful activity, and continuation of Medicaid for people whose earnings cause their income to exceed the financial eligibility criteria for SSI, provided that they have not medically recovered from the disabling conditions.

[29] "Frequent" issuance of regulations, of course, does not always equate with "timely" issuance. In a number of instances, SSA has been very slow to promulgate regulations regarding emerging areas of law, including, for example, several provisions required by the 1984 Amendments which have not yet been issued.

program. As elaborated below, however, the medical criteria for the programs are identical: a claimant who is medically eligible for either program will perforce be medically eligible for both. Also, although the financial eligibility tests of the two programs are very different, it is possible for a claimant to satisfy both programs' definitions. A disabled person may, therefore, be eligible for RSDHI, SSI or both.

2. Financial Eligibility -- RSDHI

The RSDHI program is essentially an insurance plan. A person obtains coverage under it by working in employment that is "covered" by SSA, and paying premiums, which are automatically deducted (as "FICA" tax)[30] from the worker's payroll check and matched by the employer.[31] If, for any particular calendar quarter of a year, a worker has earned a sufficient amount in wages,[32] and has accordingly had a proportionate amount of Social

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[30] FICA stands for Federal Insurance Contributions Act. Monies received in these premiums are pooled into four independent trust funds (one for disability, another for the retirement and survivors account, another for hospital insurance, and a fourth, somewhat different, account for supplementary medical insurance) from which benefits are paid.

[31] 20 C.F.R. Part 404, Subpart K (1986). Social Security now covers 125 million workers in the United States, 95% of the entire labor force. SSA, *supra* note 11, at Introduction. Self-employed workers are also embraced by RSDHI, although the procedures for remitting the taxes are different. 20 C.F.R. §§404.1065-96 (1986). RSDHI coverage is earned by working, not by paying the FICA tax, so even if the tax is erroneously not withheld, the worker may still accumulate quarters of coverage.

[32] The amount of earnings necessary to qualify for a quarter of coverage is adjusted annually by an automatic statutory index. In 1987, $460 was required (i.e., earning at least $460 in covered employment during one calendar quarter of the year would ensure that the worker had paid enough tax to qualify for one quarter of coverage.) In 1986, the required minimum amount was $440. U.S. Department of Health and Human Services, press release, Oct. 23, 1986.

A worker earns one quarter of coverage (up to a maximum of four quarters per year) for each multiple of the basic amount he or she earns, even if all the work and all the income occurred in only one quarter. Thus, a worker who earns at least $1840 (4 x $460) at any time during 1987 will be credited with four quarters of coverage for the year.

Security tax withheld, the worker is deemed to have earned a "quarter of coverage" for purposes of calculating RSDHI eligibility.[33]

Financial eligibility for RSDHI disability benefits requires that the worker a) have earned a sufficient number of these quarters of coverage and b) that the quarters of coverage be relatively "recent" with respect to the onset of the disabling impairment.[34] For most claimants, these standards require a) 40 quarters (i.e., 10 years) of work in covered employment at any time during the worker's life and b) 20 of the quarters of coverage must be within the 40 quarter period immediately prior to disability.[35]

RSDHI disability coverage thus "lapses" if a worker voluntarily leaves covered employment a significant time before the onset of a disabling impairment. If the impairment is determined to have become disabling prior to this insured status lapsing, the claimant will be eligible to receive permanent monthly disability checks.[36] If the onset is after coverage expires, there is no RSDHI disability coverage at all.[37]

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[33] Regulations for calculating quarters of coverage are at 20 C.F.R. §§404.140-46 (1986).

[34] The first condition (obtaining what SSA calls "fully insured status") is a threshold for eligibility for any of the RSDHI programs. 20 C.F.R. §§404.110-15 (1986). The second condition (for "disability insured status") is the special test for the disability portion of RSDHI. 20 C.F.R. §§404.130-33 (1986).

[35] Special rules apply to younger workers, who may not have had a full opportunity to accumulate an adequate number of quarters of coverage prior to becoming disabled. These special rules generally require the claimant to have earned quarters of coverage equivalent to one-half the number of quarters between age 21 and the time he or she became disabled, with a minimum of six quarters of coverage. 20 C.F.R. §§404.110(b)(2), 404.130(c) (1986).

[36] RSDHI disability benefits are not really "permanent," for several reasons. For example, subject to certain exceptions, if a claimant's impairment medically improves and he or she is then able to return to work, disability benefits will be terminated. Pub. L. No. 98-460, §2(a) (amending 42 U.S.C. §423(f)); 20 C.F.R. §§404.1588-98 (1986). Various rehabilitation incentives -- including notably a provision for a "trial work period" allowing a disability benefits recipient the opportunity to attempt re-entry into the work force without losing benefits -- support

(Footnote continued)

3. Financial Eligibility -- SSI

In contrast to RSDHI, SSI is a means-based welfare program, not an insurance program, so no "quarters of coverage" calculation is necessary, and there is no requirement that the claimant ever have worked.[38] Instead, the focus of the SSI financial eligibility inquiry is on the claimant's level of need, and scrutiny is made of both "income" and "resources."

For SSI purposes, income is defined broadly (e.g., to include earned as well as unearned income, and to include "in kind" support such as subsidized room or board), but a series of exclusions is also allowed (e.g., to deduct a flat amount for work-related expenses and a percentage of other receipts.)[39] The

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36(continued)
the process of recovery. 20 C.F.R. §§404.1592, 1592a, 2101-2127; 416.992, 2201-2227 (1986). See also Department of Health and Human Services Commission on the Evaluation of Pain, Report of the Commission on the Evaluation of Pain 19-21 (1986); Rocklin and Mattson, "The Employment Opportunities for Disabled Americans Act: Legislative History and Summary of Provisions," 50 Social Security Bulletin No. 3, p. 25-35 (Mar. 1987) (describing the "Section 1619" provisions through which PL 99-643 extended programs designed to support employment attempts of SSI disability recipients, by providing special SSI payments and Medicaid coverage).

Moreover, at age 65, a Title II disability recipient is automatically transferred from the "disability" portion of RSDHI to the "retirement" account. 20 C.F.R. §404.316(b)(2) (1986).

A claimant may also be awarded a "closed period of disability," a determination that he or she was entitled to benefits for a period of time but is no longer disabled. Benefits would then be payable for those months in which the claimant was under a disability. 20 C.F.R. §§404.320-22, 416.992a (1986).

[37] The worker might still, under these circumstances, be eligible for retirement or survivors coverage, but not for disability insurance.

[38] SSI is financed out of general federal tax revenues, not out of the RSDHI trust funds.

maximum federal SSI income eligibility levels for 1987 are $340 per month for an individual or $510 per month for a couple.[40]

The SSI resource test is a ceiling on the value of assets that a person may own and still qualify for benefits. Again, certain items are excluded (a car, a residence),[41] but the maximum allowance, after exclusions, is low: $1800 for an individual or $2700 for a couple in 1987.[42]

4. Medical Eligibility -- RSDHI and SSI

Although the two programs incorporate these quite different tests for financial eligibility, they employ the same standard of medical eligibility,[43] and they implement the identical statutory definition of "disability":

> "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[44]

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[39] 20 C.F.R. Part 416, Subpart K (1986). Up to $20 per month of earned or unearned income is disregarded, as well as $65 plus one-half the remainder of monthly earned income.

[40] U.S. Department of Health and Human Services, press release, Oct. 23, 1986. The 1986 levels were $336 per month for an individual and $504 per month for a couple. Id.

[41] 20 C.F.R. Part 416, Subpart L (1986).

[42] LCE (1987), supra note 1, at 1. The 1986 resource limits were $1700 and $2550. Id. The Spending Reduction Act of 1984, Pub. L. No. 98-369, §2611, provided for five annual gradual increases in the resource levels, going from $1500 to $2000 for an individual and from $2250 to $3000 for a couple. The statute does not provide for further increases after 1989.

[43] The regulations governing RSDHI medical assessment, 20 C.F.R. Part 404, Subpart P (1986) are substantially identical to the corresponding sections for SSI, 20 C.F.R. Part 416, Subpart I (1986).

[44] 42 U.S.C. §§423(d)(1)(A), 1382c(a)(3)(A) (1982).

The Act also specifies that an individual

(Footnote continued)

The mechanism for assessing a claimant against this standard is SSA's "sequential evaluation process,"[45] a multi-step inquiry into several key variables.[46] (See Chart 1)

Step 1: Substantial Gainful Activity

The first stage of the algorithm asks whether the claimant is engaged in "substantial gainful activity." For this purpose, "substantial" activity is that which involves significant physical or mental duties,[47] and "gainful" activity embraces all work of the sort ordinarily done for pay or profit.[48] Current regulations

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44(continued)

> "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." 42 U.S.C. §§423(d)(2)(A), 1382c(a)(3)(B) (1982).

[45] The sequential evaluation process has, by regulations, governed disability adjudications since 1979. It is incorporated into SSA publications and into decisional documents sent to claimants.

Two special disability categories do not fit neatly into the sequential evaluation process, but may be important to a particular claimant. One grants benefits to a claimant who has only a marginal education and work experience of 35 years or more doing arduous physical labor, and who is no longer able to perform that type of work due to a severe impairment. 20 C.F.R. §§404.1562, 416.962 (1986). The other special category grants benefits to a claimant who is of advanced age, has a limited education, and no work experience. Social Security Ruling 82-63 (Oct. 1982).

[46] 20 C.F.R. §§404.1520, 416.920 (1986). If at any stage of the sequential evaluation, it is determined that the claimant is or is not disabled, then the evaluation proceeds no further.

[47] 20 C.F.R. §§404.1572(a), 416.972(a) (1986).

establish a presumption that earning income in excess of $300 per month ordinarily indicates that the individual is performing substantial gainful activity, and is therefore ineligible for benefits.[49] However, even if the claimant is paid less than this amount, and even if he or she participates in the work force on only a part-time basis with reduced responsibilities, the performance of such work-like activities (unless they are of trifling importance or require unusual supervision or support) may be indicative of a latent ability to perform substantial gainful activity.[50]

Step 2: Severity

The next step on the sequential analysis is the question of whether the claimant's impairment is "severe" -- i.e., does it significantly limit the physical or mental ability to engage in basic work activities,[51] and does it satisfy the statutory

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[48] 20 C.F.R. §§404.1572(b), 416.972(b) (1986).

[49] 20 C.F.R. §§404.1574(b)(2)(vi), 416.974(b)(2)(vi) (1986). Earnings of less than $190 per month after 1979 will ordinarily demonstrate that the activity is not substantial and gainful. 20 C.F.R. §§404.1574(b)(3)(vi), 416.974(b)(3)(vi) (1986). Monthly earnings between those two figures are examined on a case-by-case basis. 20 C.F.R. §§404.1574(b)(6), 416.974(b)(6) (1986).

Different monetary cutoff levels are applicable to blind persons, who are not presumed to be engaged in SGA until the earnings rise to a significantly higher level. 20 C.F.R. §404.1584(d) (1986).

Different rules are also applicable to self-employed persons. 20 C.F.R. §§404.1575, 416.975 (1986).

[50] 20 C.F.R. §§404.1571, 416.971 (1986). Activities such as taking care of oneself, pursuing sedentary hobbies, etc., do not ordinarily constitute substantial gainful activity.

Under the "Section 1619 program" of Pub. L. No. 99-643 (1986), the question of substantial gainful activity will remain relevant at the initial application level of an SSI claim, but will not be used in SSI CDR cases.

[51] 20 C.F.R. §§404.1521, 416.921 (1986). "Basic work activities" include walking, standing, seeing, hearing, understanding, using judgment, responding appropriately to co-workers, etc. Id. The severity regulation provides

(Footnote continued)

12-month duration requirement.[52]

This particular step in the sequential evaluation has been in turmoil: several circuit courts had invalidated the "severity" test, finding either that it was facially inconsistent with the Social Security Act or that SSA had regularly misapplied it by transforming what was intended to be a de minimus preliminary screening process for eliminating only a few obviously non-meritorious claims into a much more powerful barrier justifying peremptory denials of large numbers of substantial cases.[53]

The Supreme Court recently upheld the logic of the severity step, determining that it was consistent with the enabling statute for SSA to pose some sort of threshold screening test. The Court did not, however, reach the question of whether the severity step, as applied in practice by SSA, was a valid exercise.[54] In the

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51(continued)

"If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience." 20 C.F.R. §§404.1520(c), 416.920(c) (1986).

[52] 20 C.F.R. §§404.1509, 416.909 (1986). The duration requirement is not really a part of any single step of the sequential analysis -- the claim must be be assessed for duration at all stages -- but discussion of it fits most logically into this segment of the analysis. See Social Security Ruling 82-52 (1982).

[53] All 11 regional federal courts of appeal had either enjoined the Secretary's use of the severity regulations or imposed a narrowing construction upon it before the Supreme Court spoke. (O'Connor, concurring in Bowen v. Yuckert, __ U.S. __ (1987), 55 LW 4740.) See Pratt v. Heckler, 629 F. Supp. 1496 (D.D.C. 1985); McDonald v. Heckler, 624 F. Supp. 375 (D.Mass. 1985), 629 F. Supp. 1138 (1986), aff'd in part, vacated in part, and remanded sub. nom. McDonald v. Secretary of HHS, 795 F.2d 1118 (1st Cir. 1986); Baeder v. Heckler, 768 F.2d 547 (3rd Cir. 1985).

[54] Bowen v. Yuckert, __ U.S. __ (1987) (55 LW 4735) The majority declared that the statutory language and accompanying legislative history had demonstrated Congressional approval of the severity step as a threshold screen. Although the statute directed consideration of

(Footnote continued)

interim, SSA has issued a new Social Security Ruling on severity, again defining it as a bar to only the weakest cases.[55]

Step 3: Listings

The next step on the sequential evaluation asks whether the claimant's impairment matches or is equivalent to one or more of the medical conditions deemed to be presumptively disabling and defined in the regulations' "Listing of Impairments."[56] If the claimant's abnormalities, singly or in concert, "meet or equal"[57]

54(continued)
vocational as well as medical factors in making the disability determination, it did not require that vocational factors be incorporated into each step of the sequential evaluation, and the assessment of severity could be based on medical criteria alone.

The majority did not reach the issue of the severity step's validity as applied in practice by SSA (55 LW 4739 n. 12). The concurrence (Justice O'Connor, joined by Justice Stevens) noted that statistics tended to support the allegation that the severity step had been molded into a substantial barrier: prior to the current severity regulation, only 8% of disability claims had been denied as non-severe; later, 40% were eliminated at that stage; after circuit courts began invalidating the regulation, the nationwide rate of "non-severe" denials fell to 25%. 55 LW 4740. Three dissenters, led by Justice Blackmun, agreed with Justice O'Connor that the validity of the severity step as applied remains problematic. 55 LW 4741.

[55] Social Security Ruling 85-28 (1985) states in part:

> "An impairment or combination of impairments is found "not severe" and a finding of "not disabled" is made at [step two of the sequential analysis] when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (i.e., the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities)."

[56] 20 C.F.R. §§404.1525, 416.925; Appendix 1 following 20 C.F.R. Part 404, Subpart P (1986).

a listed criterion, benefits will be awarded, without further inquiry into the particular effects of the impairment upon this claimant's life.

The listings contain more than 100 minutely-defined medical conditions, organized by 13 body systems (e.g., musculoskeletal, cardiovascular, neurological).[58] Each one specifies, with a high degree of precision, what the impairment is and what tests are required to diagnose its presence and severity.[59] Approximately

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[57] 20 C.F.R. §§404.1526, 416.926 (1986). The "equals" option applies to impairments (or combinations of impairments) which are not listed, but which are "medically equivalent" to a listing and impinge upon the ability to perform basic work activities in a manner equivalent to a listed impairment. In recent years only 8-9% of all disability awards have been based on "equaling" a listing; in 1976 this standard was responsible for over 45% of the awards. 1987 Background Material, supra note 1, at 36.

[58] A separate, comparable set of listings exists for the evaluation of impairments of persons under the age of 18, where the progression or effects of the disease may be different from those for adults. 20 C.F.R. §§404.1525(b)(2), 416.925(b)(2) (1986).

[59] For example, the first listed impairment, rheumatoid arthritis, is defined as follows:

> 1.02 Active rheumatoid arthritis and other inflammatory arthritis.
> With both A and B.
> A. History of persistent joint pain, swelling, and tenderness involving multiple major joints (see 1.00D) and with signs of joint inflammation (swelling and tenderness) on current physical examination despite prescribed therapy for at least 3 months, resulting in significant restriction of function of the affected joints, and clinical activity expected to last for at least 12 months; and
> B. Corroboration of diagnosis at some point in time by either.
> 1. Positive serologic test for rheumatoid factor; or
> 2. Antinuclear antibodies; or
> 3. Elevated sedimentation rate; or
> 4. Characteristic histologic changes in biopsy of synovial membrane or subcutaneous nodule (obtained independent of Social Security

(Footnote continued)

three-quarters of all disability awards are based on these listings.[60]

Step 4: Past Relevant Work

If the claimant's condition does not meet or equal a listing,[61] the sequential evaluation then directs attention to the question of whether the claimant would still be able, despite all

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59(continued)
disability evaluation).

20 C.F.R. Part 404, Subpart P, Appendix 1, Part A, Sec. 1.02 (1986).

0 The irregularity in bases for disability awards is suggested by the following chart:

Basis for disability allowance:	1960	1965	1970	1975	1980	1986
Meets listing	70%	52%	39%	29%	62%	67%
Equals listing	20%	32%	43%	44%	14%	9%
Vocational factors	10%	16%	18%	27%	24%	24%

Stone, *supra* note 1, at 226; "Social Security Disability Insurance Program," Staff Data and Materials for Committee on Finance, US Senate, 97th Cong., 2d Sess., August 1982, p. 111; 1987 Background Material, *supra* note 1, at 36.

Widows, widowers and surviving divorced spouses claiming RSDHI disability benefits based upon the work record of a deceased spouse, are eligible for disability benefits only based on the listings. These claimants do not traverse the same sequential evaluation process as others, and are not evaluated within the context of the vocational factors of the "grids." 20 C.F.R. §§404.1577-78 (1986). Similarly, children under age 18 claiming SSI disability benefits are eligible only based on the listings.

There have been allegations that SSA and DDSs have systematically circumvented the legal standards of the sequential evaluation process by effectively terminating the analysis after step 3. Claimants -- especially those alleging mental impairments -- who did not win benefits at the listings stage were sometimes categorically denied, without individualized examination of vocational factors. *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 1984), *aff'd sub nom Bowen v. City of New York*, __ U.S. __, 106 S.Ct. 2022 (1986).

impairments, to return to his or her previous employment.[62] If a resumption of former job duties is possible, the claim will be denied.[63]

Step 5: Grids

If the claimant could not meet the demands of a previous occupation, the next inquiry is whether there exists other substantial gainful activity in the national economy that the claimant could perform, notwithstanding all impairments. The primary mechanism for making this assessment is the "Medical-Vocational Guidelines" (or "grids"),[64] a series of charts

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[62] 20 C.F.R. §§404.1520(e), 416.920(e) (1986).

[63] In investigating the possibility of a claimant returning to past relevant work, SSA looks at that work which a) constituted substantial gainful activity, b) lasted long enough for the claimant to learn the job, and c) was performed within the past 15 years. 20 C.F.R. §§404.1565(a), 416.965(a) (1986); Social Security Ruling 82-62; Lauer v. Bowen, 818 F.2d 636 (7th Cir. 1987). It is assumed that gradual changes may occur in the standards and requirements of most jobs, so previous work experience gained in the distant past is no longer considered vocationally relevant.

"Past relevant work" is not confined to the demands of the job as it was actually performed by the claimant. Rather, SSA directs inquiry into the functional demands and job duties of the occupations as they are generally required by all employers throughout the national economy. Social Security Ruling 82-61 (1982).

[64] 20 C.F.R. Part 404, Subpart P, Appendix 2 (1986). Unlike the listings, which assess the claimant based on "medical" criteria alone, the grids also incorporate the principal "vocational" factors. In so doing, the grids, in effect, take "administrative notice" of the existence of jobs in the national economy that could be performed by a person of defined vocational characteristics. This notice procedure replaces the pre-1978 reliance upon the testimony of vocational experts, and obviates the necessity of identifying, for each individual claimant, the specific job categories that he or she could satisfy. Use of the grids for this purpose was endorsed by the Supreme Court in Heckler v. Campbell, 461 U.S. 458 (1983). See Capowski, "Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocations Guidelines--Two Birds With One Stone or Pigeon-Holing Claimants?" 42 U. Md.

(Footnote continued)

contained in the regulations which are designed to consider simultaneously the four key variables affecting ability to work: a) "residual functional capacity" (defined as being a measure of how much basic work activity -- standing, sitting, lifting, carrying, etc. -- the claimant can still do, despite all impairments);[65] b) age;[66] c) education;[67] and d) previous work experience and transferability of acquired skills.[68]

Each of these variables is reduced to a few categories (e.g., residual functional capacity is clustered as "sedentary," "light," or "medium," depending upon the level of exertional capability)[69] and the the grids combine all the variables into 82 "rules," each one of which is deemed "disabled" or "not disabled."[70] If a

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64 (continued)
L. R. No. 2 p. 329-383 (1983) passim (description of grids and analysis of their effectiveness in promoting sound decisions).

[65] 20 C.F.R. §§404.1545, 416.945 (1986).

[66] The age categories are: approaching retirement age (60-64), advanced age (55-60), closely approaching advanced age (50-54), and younger (18-49). The categories are not to be applied mechanically in a borderline situation. 20 C.F.R. §§404.1563, 416.963 (1986).

[67] The education categories are: unable to communicate in English, illiterate, marginal (completed sixth grade or less), limited (completed 7th-11th grade), high school and above. 20 C.F.R. §§404.1564, 416.964 (1986).

[68] The categories for previous work experience are: unskilled, semi-skilled, and skilled. Skills may be categorized as transferable or non-transferable. 20 C.F.R. §§404.1568, 416.968 (1986).

[69] Residual functional capacity may also be classified as capable of heavy or very heavy work, 20 C.F.R. §§404.1567, 416.967 (1986), but these categories are not used on the grids.

[70] For example, a person a) with the residual functional capacity for light work, b) closely approaching advanced age, c) of limited or less education, and d) who is skilled or semi-skilled with skills not transferable, would be found "not disabled" under Rule 202.11. If that same person were of advanced age, however, with all the other variables unchanged, a finding of "disabled" would be made under Rule 202.02. 20 C.F.R. Part 404, Subpart P, Appendix 2, Table 2
(Footnote continued)

claimant's medical-vocational demographics place him or her squarely on a grid rule, then the outcome of the case is determined thereby.[71]

Step 6: Off The Grids[72]

Some claimants do not fit precisely onto the grids, either because no combination of rules precisely describes their situation, or because the impairment alleged is "non-exertional" in nature.[73] The grid rules are dispositive with respect to strength limitations only; if the claim is entirely or partially based on mental impairments, sensory limitations (extreme allergies, sensitivity to temperature, etc.), pain, drowsiness or the like, then the grids are merely advisory.[74] The disability decision then becomes a more generic inquiry into whether there exists a substantial number of job categories (not necessarily job openings or jobs for which the claimant might actually be hired) that the claimant could perform.[75] This final step in the sequential evaluation process is thus a recapitulation of the

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70(continued)
(1986).

[71] 20 C.F.R. §§404.1569, 416.969 (1986).

[72] The regulations do not identify this as a separate step in the sequential evaluation process, considering it to be simply a variation of step 5 and the focus on the medical-vocational grids. However, because the substantive standards and the procedures of evaluation are significantly different when the case is not evaluated within the strength limitations context of the grids, it seems more compelling to denominate a sixth step in the analysis. Compare Capowski, supra note 64, at 359 (describing the provisions regarding non-exertional impairments as an "escape clause" from the grids.)

[73] The claim of an individual who was unable to perform the "full range" of work would not be decided directly by the grids. 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 200.00(h) (1986); Social Security Ruling 83-12 (1983).

[74] 20 C.F.R. Part 404, Subpart P, Appendix 2, Section 200.00 (1986).

[75] The test of ability to work is whether there exists a significant number of jobs in the national economy (not necessarily in the claimant's region) that the claimant would be able to perform. 20 C.F.R. §§404.1566, 416.966 (1986).

disability inquiry in toto: considering all of this person's medical and vocational limitations, could he or she perform job functions in the competitive economy?

5. Standards of Proof

The burden of proof of eligibility for disability benefits rests generally with the claimant.[76] Social Security regulations recognize three categories of medical evidence: signs, symptoms and laboratory findings.[77] Signs are anatomical, physiological or psychological abnormalities that can be observed by trained professionals using medically acceptable clinical diagnostic techniques. Symptoms are an individual's own descriptions of physical or mental impairments. Laboratory findings are the results of medically established tests such as x-rays, blood tests, etc.

Although all these categories of proof must be considered by SSA in making a disability determination,[78] the Social Security Act exhibits a profound preference for "objective," reproducible tests and findings.[79] The regulations specify that symptoms alone are insufficient to prove the existence of an impairment;[80] there must be professional corroboration. Similarly, conclusory statements from a medical examiner, such as a claimant's doctor writing simply that the claimant "is unable to work," are not binding upon SSA[81] and -- if not buttressed by additional evidence explaining the conclusion -- are unlikely to be very weighty.[82]

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[76] 20 C.F.R. §§404.1512, 416.912 (1986). Courts have shifted the burden of coming forward with the evidence, from the claimant to SSA, at step 5 (the "grids") of the sequential evaluation process, in recognition of the fact that the government is more knowledgeable than any individual claimant about the job categories and demands existing in the national economy. Torres v. Schweiker, 682 F.2d 109 (3rd Cir. 1982), cert. denied, 459 U.S. 1174 (1983); Tennant v. Schweiker, 682 F.2d 707 (8th Cir. 1982); Bowen v. Yuckert, __ U.S. __ (55 LW 4735, 4737, n. 5) (1987). This shifting burden is not mentioned in the regulations, but is "consistent with SSA policy and practice." Associate Commissioner Frank Smith, memorandum on Circuit Court Case Study, June 17, 1986, p. 7. The original decision creating the shift was Kerner v. Flemming, 283 F.2d 916 (2d Cir. 1960).

[77] 20 C.F.R. §§404.1528, 416.928 (1986). Regulations also specify the acceptable sources and preferred contents of medical evidence. 20 C.F.R. §§404.1513, 416.913 (1986).

[78] 20 C.F.R. §§404.1512, 416.912 (1986).

[79] 42 U.S.C. §423(d)(5) (1982) and Pub. L. No. 98-460, §§ 3(a)(1) and (2) (statutory standard for evaluation of complaints of disabling pain; since lapsed under terms of its "sunset" provision but sustained in a Social Security Ruling). Note, "Proving Disabling Pain in Social Security
(Footnote continued)

Observers acknowledge that, as a general matter, the definition of disability embodied in the Social Security Act and its regulations is extremely strict,[83] and, unlike many other

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79(continued)
Disability Proceedings: The Social Security Administration and the Third Circuit Court of Appeals," 22 Duquesne L. Rev. 491, 505-506 (1984); Goldhammer & Bloom, "Recent Changes in the Assessment of Pain in Disability Claims before the Social Security Administration," 35 Administrative L. Rev. 451 (1983), passim; Stone, supra note 1, at 79 (insistence upon objective criteria evidencing disability served to enhance the "strictness" of the eligibility criteria and the restraints upon program growth). However, SSA's preference for "objective" evidence does not authorize it to overlook testimony from a claimant or others regarding "subjective" conditions such as pain. See Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984) and 751 F.2d 943 (8th Cir. 1984); Avery v. Secretary of HHS, 797 F.2d 19 (1st Cir. 1986); Foster v. Heckler 780 F.2d 1125 (4th Cir. 1986).

[80] 20 C.F.R. §§404.1528(a), 1529, 416.928(a), 929 (1986).

[81] 20 C.F.R. §§404.1527, 416.927 (1986).

[82] Weinstein, "Equality and the Law: Social Security Disability Cases in the Federal Courts," 35 Syracuse L. Rev. 897, 931 (1984). The opinion of a treating physician, who has observed the claimant repeatedly over time, is ordinarily entitled to greater weight than the opinion of a consultative physician, who may have seen the claimant only once. Aubeuf v. Schweiker, 649 F.2d 107, 112 (2d Cir. 1981); Davis v. Califano, 599 F.2d 1324 (5th Cir. 1979); Hephner v. Matthews, 574 F.2d 359 (6th Cir. 1978). Nevertheless, it is the logic and the supporting evidence of the physician -- rather than a conclusory opinion -- that is compelling. Social Security Ruling 82-48c; Stieberger v. Heckler, 615 F. Supp. 1315, 1343-1350 (D.C. N.Y. 1985), vacated 801 F.2d 29 (2d Cir. 1986); Schisler v. Heckler, 787 F.2d 76 (2d Cir. 1986).

[83] National Academy of Sciences, Institute of Medicine, Committee on Pain, Disability and Chronic Illness Behavior,
(Footnote continued)

disability programs, is designed to address only the most catastrophic medical losses, associated with near-total and near-permanent inability to work. Individuals who readily meet the medical criteria of other types of disability programs (workers' compensation, Veterans Administration, etc.) are therefore frequently denied by SSA.[84] A claimant must be, in short, extremely sick or injured to qualify for disability benefits under RSDHI or SSI.[85]

83(continued) Pain and Disability: Clinical Behavioral, and Public Policy Perspectives 22-23, 33 (1987); Heaney, "Why the High Rate of Reversals in Social Security Disability Cases?" 7 Hamline L. Rev. No. 1, p. 1, 4 (Jan. 1984).

[84] See 20 C.F.R. §§404.1504, 416.904 (1986). Part of the disparity is due to the fact that some of the other programs (VA benefits, workers' compensation) are authorized to pay benefits for partial and temporary disability, whereas SSA targets exclusively those suffering from complete, long-term impairments. Swansburg, supra note 13, passim; Bloch, supra note 1, at 44-47. Part of the difference, however, is also due to the strictness of the Social Security Act's definition of disability, and SSA's tradition of construing medical eligibility standards quite restrictively.

[85] Occasional shocking instances have been reported in the press, where SSA denied benefits (or terminated the ongoing receipt of benefits) of claimants whose disabilities were manifest and overpowering -- sometimes so egregiously that death (by suicide or due to the medical impairment) has followed shortly after the SSA decision. See 1986 Hearing, supra note 1, at 7-11; D. Lauter, "Disability-Benefit Cases Flood Courts," 6 National L. J., No. 6, p. 1, 30 (Oct. 17, 1983).

Courts, too, have occasionally found SSA to be outrageous in denying benefits to deserving claimants, and in pursuing an excessively hard-line stance in litigation. Hawkins v. Heckler, 608 F. Supp. 1201 (D.Kan., 1985); Ornelas v. Heckler, 598 F. Supp. 1089 (D.Colo. 1984); Jones v. Heckler, 583 F. Supp. 1250 (N.D. Ill. 1984); Merli v. Heckler, (D.N.J., Civ. Act. No. 83-189, filed June 7, 1984); McLean v. Heckler, (E.D. Pa., Civ. Act. No. 83-3429, filed May 14, 1984.)

On the other hand, it should also be noted, as we discuss further below, that the courts see only a skewed sampling of SSA's work in disability cases, and are never presented with the opportunity to review the thousands of cases in which

(Footnote continued)

6. Benefit Levels

The amount of a claimant's monthly RSDHI benefits payment is calculated by a complex weighing of his or her prior annual average earnings in covered employment, as indexed by inflation in the national average wage level.[86] At the start of 1987, the average RSDHI benefit paid to a disabled worker was $488 per month;[87] the maximum possible for a disabled worker and dependents was $1007 per month.[88]

A disabled person's SSI check is calculated to bring his or her countable income up to the support level[89] ($340 in 1987).[90] The average monthly payment to a disabled SSI recipient was $284 in 1986.[91]

85(continued)
the adjudicatory bureaucracy has operated with accuracy, efficiency and sensitivity.

[86] 20 C.F.R. Part 404, Subpart C (1986).

[87] U.S. Department of Health and Human Services, press release Oct. 23, 1986. The average monthly payment to a disabled worker in 1986 was $482.

SSA has calculated that the present value of all RSDHI benefits to a newly entitled worker in December 1985 totalled $66,800, including approximately $39,000 in direct payments, $4800 in payments to dependents, and $20,700 in Medicare benefits. Wilkin, "Present Value of OASDI and Medicare Benefits for Newly Entitled Disabled Workers," Social Security Administration Actuarial Note No. 128 (Sept. 1986).

[88] Statistics supplied by Social Security Administration.

[89] 20 C.F.R. Part 416, Subpart D (1986).

[90] Forty-eight states and the District of Columbia voluntarily provide to at least some SSI recipients a small supplementation (e.g., $15 per month in the District of Columbia) above this minimum federal level. SSA, supra note 11, at 2. These supplementations may be "voluntary," or part of a mandatory "pass through" required for state receipt of Medicaid funds. Oklahoma v. Schweiker, 655 F.2d 401 (D.C. Cir. 1981). A few states provide sufficient supplementation to bring the recipient up to the officially-defined "poverty level."

In addition to monthly disbursements to disabled workers, eligibility for RSDHI or SSI can confer two additional types of benefits. One is benefits for family members: a disabled worker's spouse, children, divorced spouse or survivors may be eligible for certain types of RSDHI assistance, regardless of whether they themselves are disabled.[92] A second type of benefit is eligibility for health care: an individual who has been entitled to RSDHI disability benefits for 24 months is also therefore eligible for Medicare benefits,[93] and an individual who is entitled to SSI disability benefits is also thereby entitled to Medicaid coverage in most states.[94]

RSDHI and SSI differ in two respects in the sequencing of initial monthly disability payments. In RSDHI, there is a statutory waiting period of five calendar months after the onset of disability before the first monthly check;[95] SSI payments can start immediately.[96] On the other hand, an RSDHI application may have retroactive applicability, enabling the claimant to receive benefits for up to 12 months prior to the filing of the application (if the onset date of the disabling impairment is proven sufficiently far back in time),[97] whereas SSI eligibility

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[91] 50 Social Security Bulletin No. 5, p. 19 (May, 1987). The average monthly SSI payment to a disabled couple was $370 in 1986. Id.

[92] 20 C.F.R. Part 404, Subpart D (1986). The average monthly RSDHI payment to a spouse of a disabled worker was $131 in December, 1986; the average payment to an eligible child was $141. 1987 Background Material, supra note 1, at 31. SSI benefits are payable to an eligible individual and spouse only, not to dependents, but in rare cases an eligible person's stipend may be increased if there is an "essential person" (e.g., one who helps care for the disabled person) in the household. 20 C.F.R. §§416.220-23 (1986).

[93] 42 U.S.C. §426(b) (1982).

[94] 42 U.S.C. §1396(a)(10)(A)(i) (1982).

[95] 42 U.S.C. §423(c)(2) (1982); 20 C.F.R. §404.315(d) (1986).

[96] 20 C.F.R. §416.501 (1986). An SSI claimant who is "presumptively eligible" (i.e., who presents strong evidence of the likelihood of meeting the financial and medical eligibility criteria) can be awarded up to three months of disability benefits even before a final determination of eligibility is made. 20 C.F.R. §§416.931-34 (1986).

does not provide for any compensation predating the application filing date, regardless of the date of onset.[98]

A claimant may be eligible for both RSDHI and SSI concurrently. This could occur, for example, if the individual worked for a sufficiently long time in Social Security-covered employment to establish RSDHI entitlement, but if his or her wages were relatively low, so that current resources and income are beneath the SSI ceilings. A monthly RSDHI benefit check does count as income for SSI purposes,[99] so unless the individual's prior earnings (and, hence, his or her monthly RSDHI disability payment) were low, the SSI disability payment would be low or zero.

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97 20 C.F.R. §416.315(d) (1986). The number of months of retroactive RSDHI disability benefits is maximized if the onset of disability is 17 months prior to the date of application: The first 5 of these months will then be allocated to the waiting period, and 12 months of back benefits will be payable. An onset date further back in time will not increase beyond 12 the number of months of retroactive award.

98 20 C.F.R. §§416.340-50, 501 (1986).

99 20 C.F.R. §§416.1121(a), 1123(d) (1986).

B. Disability Claims Process

RSDHI and SSI applications are both handled through the same claims network,[100] a bifurcated array involving both federal officials and state agencies operating under supervision by SSA.[101] (See Charts 2 and 3)

1. Initial Application

A claimant begins the process by filing an application at one of SSA's 1300 district or branch offices.[102] In fiscal year 1986

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[100] SSA provides separate application forms for RSDHI and SSI, and a claimant who applies for both will receive parallel responses, again on separate forms. The procedures for investigating and administering the medical aspects of the two programs are identical, however, and concurrent applications are handled largely in tandem. For samples of the applicable forms and SSA notices, see Legal Counsel for the Elderly, supra note 1, at 51-73.

[101] 42 U.S.C. §§421(a), 1383b(a) (1982); 20 C.F.R. §§404.1503, 416.903 (1986). Prior to 1980, the relationship between SSA and the state agencies was one of contract. In the 1980 amendments, Pub. L. No. 96-265, Congress changed it to a regulatory one.

The federal part of the claims bureaucracy is organized as follows: SSA (headed by a Commissioner) is one of five principal operating units of the Department of Health and Human Services. SSA has four Deputy Commissioners (for Management and Assessment, Policy and External Affairs, Operations, and Programs). Each of these oversees one or more Associate Commissioners. The network of local SSA District Offices is organizationally placed directly under the Deputy Commissioner for Operations. The Office of Disability Operations is located under the Deputy Commissioner for Operations and the Associate Commissioner for Central Operations. The corps of Administrative Law Judges, the Appeals Council, and the Office of Appeals Operations are all located under the Deputy Commissioner for Programs and the Associate Commissioner for Hearings and Appeals.

[102] 20 C.F.R. Part 404 Subpart G (1986). The application form solicits information regarding the claimant's work history, medical problems, dependents, etc. It may be completed in person or through a representative. Id.

An SSA claims representative at the district office has

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1.2 million RSDHI disability claims and 1.2 million SSI disability claims were filed.[103]

The district office begins the formulation of a two-part "initial determination," by investigating the claimant's financial eligibility for RSDHI, SSI or both.[104] If the claimant is found ineligible, a notice of denial is mailed.

If the claimant satisfies the applicable financial eligibility tests, the file is forwarded to another office for making the second part of the initial determination, regarding medical eligibility. This office is part of a state government agency (usually within the state's vocational rehabilitation service) operating as a federally funded Disability Determination Service (DDS) under the regulation of SSA.[105] The DDS develops the medical file by soliciting existing records and other documents from the claimant's physicians, hospitals, clinics,

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102(continued) usually been available to interview the applicant and assist in the completion of the form. As a result of recent staffing cuts, SSA offices are now increasing their reliance upon claimants or their representatives filling in the forms themselves, without official assistance. These "self-help" procedures will be utilized with greater frequency, unless the claimant asserts an inability to do so. Memorandum from Office of Chicago Regional Commissioner to All District, Branch, Teleservice Center, and Satellite Office Managers, January 28, 1987.

[103] SSA, supra note 11, at 29, 31. In FY 1987, an estimated 1.3 million RSDHI disability claims are anticipated. Id. at 29.

[104] 20 C.F.R. §§404.902-05, 416.1402-05 (1986). For RSDHI claims, the district office obtains a copy of the wage earner's earnings record (showing all SSA-covered income and quarters of coverage) from SSA's Office of Operational Policy and Procedures. For SSI cases, the Office of Central Operations and the local district office investigate the claimant's income and resources.

[105] 20 C.F.R. Part 404 Subpart Q; Part 416, Subpart J (1986). The 1980 Amendments made it possible for SSA to replace the DDS in a particular state, and perform the medical evaluation itself, where the DDS is not conforming to SSA standards. The actual practice has not yet been modified in any states. 42 U.S.C. §421, Pub. L. No. 96-265, Sec. 304(a)-(f), 94 Stat. 453-56 (1980).

[106] The DDS may pay reproduction costs for obtaining these

(Footnote continued)

etc.[106] If necessary, the DDS may also obtain additional medical assessments by ordering a "consultative examination," in which a physician, under contract with the DDS, performs specified tests or measurements.[107]

The DDS decision regarding medical eligibility, pursuant to the sequential evaluation process outlined above, is made by a two-person team, comprising one medical consultant and one disability examiner.[108] These officials conduct a paper review only -- they do not meet with the claimant.[109]

106(continued)
records. 20 C.F.R. §§404.1514, 416.914 (1986). If the DDS is not as vigorous as it should be in collecting medical records, the shortage of such documentation usually redounds to the claimant's disadvantage, because it is the claimant who must bear the burden of proof. See 20 C.F.R. §§404.705, 1516, 416.916 (1986); Weinstein, supra note 82, at 931.

Apprehensions about the adequacy of DDS workups of the medical file have been exacerbated recently as SSA budget cuts have reverberated in reduced DDS staffing and services. See letter from Reps. Rostenkowski, Pickle & Jacobs to SSA Commissioner Hardy, Feb. 3, 1987.

[107] 20 C.F.R. §§404.1517-18, 416.917-18 (1986). The quality and sufficiency of typical DDS consultative examinations have become controversial issues. Bloch, supra note 1, at 234, 273-76; Committee on Government Operations, U.S. House of Representatives, "Consultative Examinations Investigation," 99th Cong., 2d Sess., Report 99-981, passim (Oct. 9, 1986); Stone, supra note 1, at 121-24.

A claimant's failure to cooperate with a consultative examiner is grounds for denial of the claim. 20 C.F.R. §§404.1518, 416.918 (1986).

[108] The disability examiner or specialist ordinarily does the bulk of the work on the application. The medical consultant is a physician employed part-time or full-time by the DDS to evaluate medical conditions beyond the expertise of the disability examiner and assess the claimant's residual functional capacity. These two officials may also be assisted by a vocational expert. Bloch, supra note 1, at 235; Department of Health and Human Services Commission on the Evaluation of Pain, supra note 36, at 23; Weinstein, supra note 82, at 908.

[109] The 1984 Disability Amendments directed SSA to conduct a "demonstration project," experimenting with a face-to-face

(Footnote continued)

An "initial determination" of this sort is also made when a previously-allowed claim is periodically reviewed. These "Continuing Disability Reviews" (CDRs) are undertaken to assess possible improvement in the claimant's condition and to remove from the disability rolls people who are no longer eligible for benefits.[110] CDRs, and the standards and procedures for conducting them, have been controversial in recent years, and were suspended from 1984-86, pending the enactment and implementation of new statutory standards.[111]

109(continued)
interview between the claimant and the DDS disability examiner at the initial determination level in both new application and CDR cases. This interview would substitute for the reconsideration level. H.R. Rep. No. 618, 98th Cong., 2d Sess., 17 (1984); 8 Social Security Forum 1, p. 3 (Jan. 1986). Ten states have been selected for participation in this experiment. 51 Fed. Reg. 15465 (Ap. 24, 1986). A report to Congress about the experiment is due in September 1988.

[110] CDR procedures vary somewhat from the initial sequential evaluation process, as they focus on the extent to which the claimant's condition has improved or been mitigated by new medical techniques, and whether any improvement affects the claimant's ability to work. There are three categories of cases, classified according to the initial likelihood of subsequent medical improvement, and the frequency of review varies from once every six months to once every seven years. 20 C.F.R. §§404.1590, 1594, 416.990, 994 (1986). See also General Accounting Office, "Social Security: Adjusting Continuing Disability Review Priorities," Oct. 1986 (report critiquing the selection of types of cases for early CDRs); Sweeney, "The New 'Medical Improvement' Standard in Social Security and SSI Disability Cases," passim, March, 1986.

SSA has not yet fully implemented the new provisions for conducting CDRs, and few new termination cases have yet worked their way up the appellate ladder. ALJs nationwide received only 117 requests for hearings in CDR cases in May 1987, and the Appeals Council received only 8 CDR cases that month. OHA Key Workload Indicators, May 1987, p. 6.

[111] 42 U.S.C. §§423(f), 1382c(a)(5) (1982), Pub. L. No. 98-460, Sec. 2(a). Legal Counsel for the Elderly (1987), supra note 1, at 12-34.

The 1980 legislation provided for a review of current beneficiaries, and this process was greatly accelerated by
(Footnote continued)

A sample of DDS decisions is then subjected to "Quality Assurance Review" by regional and national tiers of SSA appraisers, who have the power to reverse state agency determinations, or to send them back for the DDS to correct.[112]

111(continued) the Reagan Administration. Approximately 1 million cases were then reviewed, and almost half of them were terminated, producing huge financial savings for SSA. However, over half of those terminations were later reversed on appeal, and the standards, the seemingly brusque CDR procedures, the often improper CDR practices and the prolonged delays occasioned by the skyrocketing caseloads alienated many people. Staff report of Social Security Subcommittee, U.S. House of Representatives Committee on Ways and Means, "Disability Legislation 1983: Background and Issues," (June 28, 1983); 1987 Background Materials, supra note 1, at 43; Cofer, supra note 1, at 116; Weaver, "Social Security Disability Policy in the 1980's and Beyond," in Disability and the Labor Market: Economic Problems, Policies and Programs 29-63 (M. Berkowitz and M. Hill eds. 1986); Staff Data and Materials prepared for Committee on Finance, US Senate, "Social Security Disability Insurance Program," 97th Cong., 2d Sess., 47-64 (Aug. 1982); Report from Secretary of HHS Margaret Heckler to the Congress regarding Pub. L. No. 96-265, Jan. 4, 1985, p. 67-72.

[112] 42 U.S.C. §421(c); 20 C.F.R. §§404.1503(d), 416.903(d) (1986). City of New York v. Heckler, 578 F. Supp. 1109, 1113-14 (E.D.N.Y. 1984), aff'd sub nom Bowen v. City of New York, 476 U.S. 467 (1986).

There are two distinct sampling programs pursuant to which SSA reviews the work of the DDSs. Under one, 65% of all DDS awards are reviewed, prior to effectuation, by regional and national tiers of SSA officials. In FY 1986, this amounted to 250,000 decisions, of which only 0.25% were returned to the DDS for correction or collection of additional evidence. The other review program selects 5% of all DDS decisions -- in FY 1986, this totaled 83,000 cases, divided equally among favorable and unfavorable actions -- for review by SSA regional offices. The SSA Central Office then reviewed 10,000 of the regional offices' cases, to promote consistency across the nation. Through these reviews, SSA has concluded that DDS disability decisions were highly accurate, being correct 96.6% of the time for initial determinations and 95.5% of the time for reconsideration actions. SSA, supra note 11, at 13.

(Footnote continued)

Thereafter, the claimant is notified, and if the decision is not "fully favorable," the claimant has 60 days within which to appeal.[113] Approximately 1-1/2 million initial determinations in disability cases are made each year, of which 40% are favorable.[114] The process consumes, from application to

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112(continued)
On the other hand, there have been instances of DDS offices distorting their accuracy records by deliberately removing erroneous cases from the supposedly random sample of files to be sent to SSA quality assurance reviewers, and substituting hand-picked correctly-decided cases, in order to inflate the office's performance rankings. Report of Thomas W. Hayes, Auditor General, State of California, February 17, 1987.

Historically, the degree of SSA review of DDS decisions has varied substantially. Before 1972, up to 70% of state disability allowances were routinely reviewed by SSA prior to effectuation. Later, to save administrative costs, SSA sampled only 5% of the awards, and only for post-effectuation analysis. Under the 1980 amendments, Congress required an increasing percentage (15% in FY 1981, 35% in FY 1982, and 65% thereafter) of DDS allowances to be reviewed by SSA before payment. Senate Finance Committee, supra note 1, at 1283-84; Cofer, supra note 1, at 114; 1987 Background Materials, supra note 1, at 37.

[113] 20 C.F.R. §§404.909, 416.1409 (1986). In this instance, as with all succeeding time limits described below, the 60-day period runs from the date of the claimant's receipt of the decision, and SSA assumes (until evidence to the contrary is presented) that the claimant receives the notice 5 days after it is dated, 20 C.F.R. §§404.901, 416.1401 (1986). SSA allows extension of the time period for good cause, 20 C.F.R. §§404.909(b), 911, 416.1409(b), 1411 (1986).

[114] 1987 Background Materials, supra note 1 at 41. In FY 1986, there were 1,558,346 initial determinations on new applications, of which 39% were allowances, and there were 47,737 initial determination on CDRs, of which 94% were continuances. The allowance rate in CDR cases was unusually high, due to SSA's policy of starting the CDR process by looking at those cases in which medical improvement was not expected. During the first nine months of FY 1987, as SSA began looking at more cases in which improvement had been considered "possible" or "expected," the rate of terminations jumped significantly. 13 NSCLC Washington Weekly, No. 37, p. 1 (Sept. 25, 1987).

notification, approximately 80 days.[115]

2. Reconsideration

If the claimant is dissatisfied with the initial determination, he or she may request "reconsideration."[116] Under reconsideration, the same procedures are followed as in making an initial determination, but different people within the respective offices make the assessments.[117] That is, if the initial denial was based on financial eligibility grounds, a new person within the SSA district office will review the files; if the original determination was based on a finding of medical ineligibility, a new two-person team at the DDS will examine that aspect of the case. The claimant may submit additional evidence at this time, but ordinarily does not appear in person before the SSA or DDS decisionmakers.[118]

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[115] Average DDS processing time for initial RSDHI applications rose from 63 days in September 1985 to 89 days in February 1986, then fell to 80 days in September 1986. Similarly, average SSI disability case processing time rose from 55 days in September 1985 to 85 days in February 1986 and declined to 79 days in September 1986. Part of the overall rise is attributed to the learning process required in implementing the new regulations concerning mental impairments and medical improvements. SSA, supra note 11, at 14.

One analyst estimated that the average cost to SSA (in 1978) of processing an initial application was $205. Schwarz, "Commentary: Adjudication Process Under U.S. Social Security Disability Law: Observations and Recommendations," 32 Admin. L. R. 555, 562 (1980) (assessment based on interview with New Mexico DDS employee and letter from SSA Associate Commissioner). By this reckoning, reconsideration activity also cost $205, an average ALJ hearing cost $464, and Appeals Council activities were priced at $219 per disposition. Id. at 562, 564. See also "Component Workload Unit Cost," provided by SSA (estimating DDS decisions as costing $276-353 each, ALJ hearings at $837-913, and Appeals Council reviews at $451-526.)

[116] 20 C.F.R. §§404.907-22, 416.1407-22 (1986). There has been no reconsideration in SSI or concurrent SSI/RSDHI continuing disability cases. An SSI recipient whose benefits were to be cut off would proceed immediately from an adverse initial determination to an ALJ hearing. 20 C.F.R. §§404.907, 416.1407 (1984). This procedure, however, has been altered with the institution of "disability hearings" at the reconsideration stage in all RSDHI and SSI CDR cases. See infra, note 117.

[117] SSA has promulgated new regulations, implementing a requirement of the 1984 Amendments, to authorize face-to-face "disability hearings" before a DDS disability examiner at the reconsideration stage in cases where benefits are being terminated due to a claimant's medical improvement.
(Footnote continued)

Again, the claimant is notified by mail of the decision, and again accorded 60 days to appeal further.[119] Approximately 380,000 reconsideration decisions were issued in 1986, of which 17% were favorable.[120] The reconsideration process typically takes two months or more.[121]

3. ALJ Hearing

The next tier in the application process is a de novo in-person hearing before a federal administrative law judge.[122]

117(continued)
These disability hearings will address only the question of the claimant's medical condition; other issues (SSI income level, performance of substantial gainful activity, etc.) will continue to be handled in the ordinary reconsideration process. 20 C.F.R. §§404.914-18, 416.1414-18 (1986); Legal Counsel for the Elderly (1987), supra note 1, at 7-11; Memorandum from Eileen Sweeney, National Senior Citizens Law Center, to Legal Services Advocates and Members of the Private Bar Representing Social Security and SSI Beneficiaries in Cessation Cases, February 5, 1986.

A person who receives a medical termination notice has the option to elect to receive continuing benefits pending appeal to the reconsideration and ALJ stages. (This provision was enacted for SSI cases by the 1984 Amendments; it has become a subject of annual congressional debate for the RSDHI disability program.)

[118] There have been some pilot projects providing for face-to-face meetings between claimant and decisionmaker at the DDS reconsideration level in new applications. Cofer, supra note 1, at 184.

[119] 20 C.F.R. §§404.933, 416.1433 (1986).

[120] 1987 Background Materials, supra note 1, at 41.

[121] The time frame for reconsideration is comparable to that for an initial determination, and subject to the same types of delay.

This is ordinarily the claimant's first opportunity to meet face-to-face with the person who makes a decision on the application, and it is the first occasion for taking testimony under oath from other witnesses. It is also typically the first stage at which the claimant obtains legal or other representation.[123]

SSA now employs nearly 700 ALJs at 132 hearing offices around the country.[124] They are paid at the GS-15 level and protected by

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[122] 42 U.S.C. §§405(b)(1), 1383(c)(1) (1982); 20 C.F.R. §§404.929-65, 416.1429-1465 (1986).

These decisionmakers were originally designated as "hearing examiners" until Congress changed the designation in 1972 in an effort to upgrade the stature and autonomy of the position throughout the federal government. Cofer, supra note 1, at 65-66.

[123] Approximately 65% of claimants have legal representation at the ALJ hearing and 18% have non-attorney representation. 9 Social Security Forum No. 3, p. 7 (Mar. 1987). SSA must approve all fees for attorney representation. The fee could reach any amount, but SSA will withhold from its payments to the claimant no more than 25% of past due benefits for direct transmittal to the attorney. 42 U.S.C. §406; 20 C.F.R. Part 404, Subpart R; Part 416, Subpart O (1986). The average attorney fee was $1,548 in FY 1986 and $1409 in FY 1985. OHA Operational Report, Sept. 30, 1986, p. 24. There is a controversy regarding the direct payment of attorney fees in SSI cases. See Galbreath v. Bowen, 799 F.2d 370 (8th Cir. 1986), cert. granted __ U.S. __ (1987).

SSA rules regarding the size and speed of awards of attorneys fees have become controversial, as many claimants' representatives assert that recent OHA initiatives threaten to make disability law so unremunerative that private practitioners will be driven out of the field. SSA and the HHS Inspector General, on the other hand, have asserted that attorney's fees have become too high, on a per-hour basis. See 9 Social Security Forum, No. 8, p. 1 (Aug. 1987).

ALJs are often charged with a special responsibility to help an unrepresented claimant make out a case. See Heckler v. Campbell, 461 U.S. 458, 471 (1983) (Brennan, J., concurring).

[124] Normal attrition continuously reduces the number of ALJs; the corps is irregularly supplemented with a new class of ALJs. The last class, in 1986, added 36 new ALJs, but current projections suggest that the corps will shrink to

(Footnote continued)

Administrative Procedure Act safeguards.[125]

124(continued)
below 650 in 1987.

[125] 5 U.S.C. §§554(d), 3105, 5362, 7521 (1982).

The national Chief ALJ of SSA occupies a GS-16 position. ALJs atached to most other federal agencies are generally at the GS-16 grade, with national or regional chiefs at GS-17. SSA's regional chief ALJs have been approved for GS-16 slots, but the upgrading is not now being accomplished. Most other efforts by SSA ALJs to have their status upgraded have not received support from SSA or the Office of Management, Budget, and Personnel. See National Center Study, supra note 1, at 41-42.

The Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 111, incorporated many original provisions of the APA and provides the bureaucratic independence essential for an ALJ's decisional autonomy. ALJs are screened, employed and paid by the Office of Personnel Management, not by SSA. Agency ratings of ALJ performance for compensation entitlement purposes is prohibited, and ALJs may be removed only for good cause. The ALJs are not responsible to, or subject to the supervision of, anyone in the agency performing investigative functions. Ass'n of Administrative Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984); 5 U.S.C. §§5372, 4301(2)(D); Lubbers, "A Unified Corps of ALJs: A Proposal to Test the Idea on the Federal Level," 65 Judicature No. 5, p. 266-276 (Nov. 1981).

The Merit Systems Protection Board (which superseded the Civil Service Commission in 1979) implements the standards providing that ALJs may be disciplined or removed from office only for good cause. 5 U.S.C. §7521(a) MSPB prodcedures are lengthy and exhaustive; they afford substantial protection for ALJs, and SSA has not been notably successful in disciplining aberrant ALJs, even for issues such as unusually low case production. Cofer, supra note 1, at 146-49; Rosenblum, "Contexts and Contents of 'For Good Cause' as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors," 6 Western New Eng. L. R. No. 3, p. 593, passim (1984). However, even the threat of disciplinary proceedings may have a substantial impact on ALJ behavior, creating a climate in which autonomy is circumscribed.

The Social Security Act antedated the APA by seven years and served as a model for the Attorney General's Committee which

(Footnote continued)

The ALJ may order additional consultative examinations before or after the hearing,[126] may call a vocational or medical expert to testify,[127] and will question the claimant and any other witnesses.[128] The claimant (or a representative) may submit

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125(continued) drafted the APA. Although the full applicability of the APA to ALJ hearings is not explicit in legislation, as a practical matter APA standards have been incorporated into most SSA practice. Cofer, supra note 1, at 66-70. With respect to RSDHI, at least, the Supreme Court has declared that the APA and the Social Security Act are equivalent in requiring the same procedures. Richardson v. Perales, 402 U.S. 389, 409 (1971); National Center Study, supra note 1, at 35-38.

[126] The classic description of a non-adversarial SSA administrative hearing is that the ALJ must "wear three hats," executing simultaneous responsibility for 1) ensuring that the claimant -- especially when appearing pro se -- puts forward the strongest case possible, 2) developing the record fully and critically, and 3) deciding the case.

[127] A vocational expert appears in approximately 20% of the ALJ hearings, most often when there is an issue concerning non-exertional impairments or the level and transferability of the claimant's skills. 9 Social Security Forum No. 3, p. 7 (1987). Usage of VE testimony has increased over the past several years, but is still substantially below the level experienced in the late 1970's, prior to implementation of the "grid" rules; id at 8; OHA Operational Report, Sept. 30, 1986, p. 30.

If a vocational expert will testify, the ALJ will notify the claimant in advance, and provide an opportunity for cross-examination. 20 C.F.R. §§404.1566(e), 416.966 (1986); Bloch, supra note 1, at 279-81.

[128] There is no SSA advocate opposing the claimant in the hearing. An experiment, in selected locales, with "government representatives" who would develop an advocacy position, cross-examine claimants' witnesses, etc., has been terminated. The government representative would appear only in cases where the claimant also had a representative at the hearing, but would prepare the file in any case. 20 C.F.R. §§404.965, 416.1465 (1986); 52 Fed. Reg. 88 (May 7, 1987) (ending the experiment).

SSA had argued that the Government Representation Experiment

(Footnote continued)

additional medical records, submit a brief, deliver opening and closing remarks, and question all witnesses. Hearings are non-adversarial, and the level of formality varies.[129] A hearing is tape recorded and on the average lasts approximately 30-60 minutes.[130]

128(continued)
might be able to make ALJ hearings quicker, more accurate and more productive, as well as saving money, by charging the government representative with the task (otherwise performed by the ALJ) of developing and presenting a complete record. OHA Operational Report, Sept. 30, 1984, p. 4-5.

The experiment was run for three years before it was halted in response to a 1986 injunction issued by a Virginia federal district court. Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986) (experiment enjoined as being improperly implemented, failing to promote accuracy, uniformity or productivity, and violating due process). SSA then decided not to resume the experiment, for "managerial, administrative and budgetary considerations," 52 Fed. Reg. 88 (May 7, 1987) but has not released any data about the comparative effects of government representation. Congress had also expressed displeasure at the experiment, and in 1986, the House passed a bill that would have aborted the program. Claimants' representatives also considered the Government Representation Experiment a disaster, arguing that it made the administrative proceedings excessively formal, adversarial, and intimidating.

[129] See National Center Study, supra note 1, at 64-99 for a critical description of the ALJ hearing process.

[130] Hearings in which the claimant is unrepresented are typically much shorter (e.g., 20-30 minutes); hearings with counsel, and especially with multiple witnesses, may run two hours or more.

SSA has recently purchased state-of-the-art four-track tape recording equipment for all hearing offices, to reduce the number of instances when hearing tapes were inaudible. OHA Operational Report, Sept. 30, 1986, p. 4.

The claimant is often the only witness in the case, but frequently a spouse or friend will appear, and sometimes a medical or other expert as well. Legal Counsel for the Elderly, supra note 1, at 75-77. In Fiscal Year 1986, the percentages of involvement in hearings were: claimant involved 97% of the time; family or friend, 34%; vocational

(Footnote continued)

The volume of disability cases decided by ALJs -- and the accompanying workload and backlog per ALJ -- have fluctuated wildly in recent years.[131] SSA's Office of Hearings and Appeals has undertaken a number of controversial measures in recent years to enhance the productivity of ALJs, including "reconfiguring" the local hearing offices (by "pooling" the staff attorneys and hearing assistants who had previously been assigned to specific ALJs); setting national "targets" for case processing speeds; arranging "peer counseling" for low-producing ALJs; and attempting direct job discipline. Most of these measures have been bitterly resented by ALJs and claimants' representatives as official attacks upon the ALJs' decisional independence.[132]

130(continued) expert, 21%; medical advisor, 10%; translator, 4%; and claimant's physician, 1%. 9 Social Security Forum No. 3, p. 7 (Mar. 1987).

[131] Moratoria on CDR cases are responsible for a large part of the recent fluctuation. Data regarding ALJ hearing workload are as follows:

Fiscal Year	Receipts	Dispositions	Pending (End of)	Average ALJs on duty	Average Dispositions per ALJ	Processing Time(days)
82	320,680	296,548	152,896	754	34	174
83	363,533	342,998	173,431	797	37	184
84	271,809	337,459	107,781	763	37	185
85	245,090	245,829	107,042	730	29	167
86	230,655	220,313	117,384	703	27	172
Oct 86	22,575	17,561	122,938	686	26	176
Nov 86	19,904	15,492	126,810	685	23	178
Dec 86	21,388	17,557	130,641	684	26	181
Jan 87	18,400	17,072	134,570	675	26	194
Feb 87	22,695	17,075	140,190	672	26	195
Mar 87	26,550	20,891	145,849	668	32	199
Apr 87	21,158	20,676	148,429	663	32	201
May 87	19,244	19,027	149,432	661	29	202
Jun 87	26,252	23,643	151,255	660	37	206
Jul 87	20,527	22,846	150,877	652	36	207

Office of Hearings and Appeals, Key Workload Indicators, July, 1987, p. 1.

[132] Cofer, supra note 1, passim; See also sources cited supra note 168.

Approximately three months after the hearing, the claimant will be notified by mail of the ALJ's decision, and accorded a further 60-day appeal opportunity.[133] Of the 220,313 cases taken to the ALJ stage in FY 1986, 173,675 went to a hearing. Of these, 106,385 (61%) resulted in an award of benefits.[134] The ALJ stage,

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[133] 20 C.F.R. §§404.968, 416.1468 (1986).

[134] In FY 1986, 46,638 cases (21.1% of the total presented to ALJs) were dismissed without a hearing decision, including 20,198 mental impairment cases returned to DDSs for further work-up. The FY 1985-86 figures are unusual and reflect the fact that, when SSA issued the new mental impairment listings in August, 1985, thousands of cases had to be returned for review under the new standards. Dismissal rates in prior years were significantly lower: 12.4% in FY 1985, 15.1% in FY 1984, 9.7% in FY 1980. In a typical year, most of these dismissals arise when a claimant abandons the matter, or when time deadlines are not met. An ALJ may also award benefits, without conducting a hearing, if the documentary record is sufficient.

Based on the entire ALJ caseload (that is, including dismissals), ALJs awarded benefits in 48.3% of the cases in FY 1986, 50.9% in FY 1985, 51.6% in FY 1984, and 55.8% in FY 1980. Excluding dismissals, the allowance rates were 61% in FY 1986, 58% in FY 1985, 61% in FY 1984, and 62% in FY 1980. OHA Operational Report, Sept. 30, 1986, p. 24-26.

The following charts demonstrate current and expected future ALJ work loads:

Number of hearing dispositions:	1986	1987(estimated)
RSDHI disability cases	91,039	118,776
SSI	48,774	63,405
Concurrent cases	65,698	85,496
Other types of cases	14,802	19,323
Total	220,313	287,000

	1985	1986	1987(est.)
No. of ALJs (as of Sept. 30)	705	696	685
Average monthly hearing dispositions per ALJ	29	27	35
Average hearings pending per ALJ	152	169	158

SSA, *supra* note 11, at 32-33.

(Footnote continued)

from the time of request for a hearing through the date of a decision, typically takes six or seven months.[135]

4. Appeals Council

The last level of administrative consideration is provided by the SSA Appeals Council, whose result is a final decision of the Secretary of HHS, thus exhausting administrative remedies. The Appeals Council is described in detail in the succeeding subsection.

5. Judicial Review

A claimant dissatisfied with the final agency

134(continued) The historical record of ALJ activity is uneven. ALJs took actions favorable to the claimant in 8.4% of the cases in FY 1958; 15.2% in FY 1960; 28.9% in FY 1965; and 41.6% in FY 1970. (Of these cases, 71.4% were disability claims in FY 1960; 82% involved disability in 1970.) Department of Health, Education, and Welfare, Briefing Pamphlet for the Bureau of Hearings and Appeals, June 30, 1971, p. 15.

[135] OHA Key Workload Indicators, July 1987. The average processing time from the date of the request for hearing to the date of the hearing has recently ranged from 108 days in FY 1985 to 140 days in July 1987. The average time from the hearing to the ALJ's decision has recently ranged from 65 days in FY 1982 to 85 days in the second quarter of 1987. Id. At the start of FY 1986, the Associate Commissioner established the goal of 155 days average processing time for hearings. Actual performance was 172 days average. OHA Operational Report, Sept. 30, 1986, p. 4.

The expanding ALJ caseload over several years generated huge backlogs and extraordinary delays pending an ALJ hearing. Some courts intervened, to establish or require fixed time limitations on SSA actions, Blankenship v. Secretary of HEW, 587 F.2d 329 (6th Cir. 1978). The Supreme Court, however, in Heckler v. Day, 467 U.S. 104 (1984), ruled that district courts did not have the legal authority to create such timeliness standards on a broad class-wide basis, and could continue to do so only within the context of individual cases. There has also been litigation regarding SSA delays in paying a claim after the ALJ has ruled favorably on the case. Holman v. Heckler, No. 78-0494, (M.D. Pa. May 1, 1987).

[136] Exhaustion of administrative remedies is required before a

(Footnote continued)

determination[136] may appeal, within 60 days, to the U.S. District Court,[137] and from there to a Circuit Court of Appeal and to the Supreme Court.[138]

136(continued)
claimant may pursue a claim in federal court. 42 U.S.C. §405(g), (h); Weinberger v. Salfi, 422 U.S. 749 (1975). However where the Secretary or the court deems it appropriate, the exhaustion requirement may be waived. Bowen v. City of New York, ____ U.S. ____, 106 S. Ct. 2022 (1986).

An expedited appeals process is available, to omit the ALJ and/or Appeals Council stages and proceed directly from reconsideration to federal court, when the claimant and SSA stipulate that the only issue remaining in the case is the alleged unconstitutionality of a provision of Social Security law. 20 C.F.R. §§404.923-28, 416.1423-28 (1986); Office of Hearings and Appeals Handbook, at 5-38-18D.

[137] It is noteworthy that appeal of SSA decisions, unlike those of most other administrative agencies, lies with the federal district court, rather than directly with the court of appeals. The volume of the cases, and their orientation to facts rather than law, probably compel this level of review.

Many federal courts now routinely channel disability cases for consideration by a U.S. magistrate, rather than the district judge. Pursuant to 28 U.S.C. §636, the magistrate may hear the case (often proceeding more quickly than the court would) and make a recommended decision for the judge. The district judge will review the magistrate's recommendations (and the parties' comments thereon) and retain power to affirm, reverse or modify them. Matthews v. Weber, 423 U.S. 261 (1976). By consent of the parties, a magistrate may be authorized to conduct all proceedings and enter a final judgment, with no review by the district judge. 28 U.S.C. §636(c).

[138] 20 C.F.R. §§404.981, 416.1481 (1986). Federal court jurisdiction is founded upon 42 U.S.C. §405(g).

In FY 1985, 394 cases were appealed to circuit courts. (This was 7.5% of the cases denied or dismissed by district courts.) That year, the circuit courts ruled in favor of claimants in 21% of the cases. The Supreme Court rarely takes cognizance over disability cases; it heard none in FY 1985. Institute of Medicine, supra note 83, at 48-49.

See National Center Study, supra note 1, at 125-50 for a

(Footnote continued)

The statutory standard of review upholds the Secretary's findings of fact, if they are supported by substantial evidence.[139] The court will also review the case for errors of law, although this is a somewhat less common basis for appeal.[140] The reviewing court may affirm, modify, reverse or remand the Secretary's decision.[141] Reversals (awarding benefits to the claimant) occur when the Secretary's decision is not supported by substantial evidence and the claimant moreover satisfies the burden of proof of disability.[142]

Remands to the Secretary can occur in a variety of

138(continued) critical assessment of the operation of judicial review.

[139] 42 U.S.C. §405(g) (1982). Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

Critics have argued that district courts often ignore the substantial evidence test and engage in making *de novo* factual determinations. House Conference Report No. 96-944 on Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 (1980), *reprinted in* US Code Cong. & Admin. News, Vol. 3, p. 1409 (1980).

As early as 1960, SSA Commissioner Mitchell argued, "Nevertheless, in some cases, courts have not followed the 'substantial evidence' rule and have made their own assessment and appraisal of the facts." Report to the Secretary from SSA Commissioner Mitchell, p. 3 (Sept. 6, 1960).

[140] A federal court does not show the same deference to the administrative conclusions of law as it does to findings of fact. Ridgely v. Secretary, 345 F. Supp. 983, 988 (D.Md. 1972), *aff'd* 475 F.2d 1222 (4th Cir. 1973); Ferran v. Flemming, 293 F.2d 568 (5th Cir. 1961).

[141] A federal district court also holds equitable power to issue injunctions in SSA disability cases. Califano v. Yamasaki, 442 U.S. 682 (1979).

[142] Simpson v. Schweiker, 691 F.2d 966 (11th Cir. 1982); Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982); Wander v. Schweiker, 523 F. Supp. 1086 (D.Md. 1981).

circumstances. A court may order a remand for a new hearing or new decision if an improper legal standard or procedure was adopted, if the administrative record was incomplete, or if SSA failed to accord proper weight to the evidence.[143]

A remand will also be ordered, on the Secretary's motion, for further administrative action to review or correct SSA's administrative decision to deny benefits. The Secretary's motion must be made before an answer is filed, and is to be based on good cause.[144]

The number of new federal district court cases filed against SSA in disability matters each year fluctuates widely: roughly 9,000 cases were filed in 1981; 13,000 in 1982; 27,000 in 1983; 26,000 in 1984; 19,000 in 1985; 9,000 in 1986; and 4,000 in the first five months of 1987. Throughout this period, there have been 40-50,000 SSA disability cases pending in the federal courts at any given time.[145]

The "reversal rate" (the percentage of cases in which the federal court awards benefits) has gyrated similarly: 20% in 1982, 30% in 1983, 57% in 1984, 46% in 1985, and 38% in 1986.[146]

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143 Aubeuf v. Schweiker, 649 F.2d 107 (2d Cir. 1981); Camp v. Schweiker, 643 F.2d 1325 (8th Cir. 1981); Diabo v. Secretary of HEW, 627 F.2d 278 (D.C. Cir. 1980); Allen v. Weinberger, 552 F.2d 781 (7th Cir. 1977).

144 42 U.S.C. §405(g) (1982). Prior to the 1980 amendments, the Secretary had an absolute right to have the case remanded for further administrative consideration. This unqualified authority arguably reduced SSA's incentive for developing the case properly on its first opportunity. Bloch, supra note 1, at 308; Senate Finance Committee, supra note 1, at 58

145 Calendar year data provided by the Chief Counsel for SSA Don Gonya, June 24, 1987. Of the total of SSA cases, 96% involved claims for disability benefits. In Fiscal Year 1986, 10,716 new cases were filed in federal courts appealing SSA denials. Of these, 10,070 (96%) concerned disability: 5930 on the disability portion of RSDHI, 1255 on SSI and 2885 concurrent.

The recent dip in court cases is largely attributable to the 1984-86 moratorium on Continuing Disability Reviews, which had generated large numbers of federal filings.

146 Gonya, supra note 145. These figures do not include court remands. The annual number of court remands is large and

(Footnote continued)

Even beyond the quantity of individual cases reviewed, the federal judiciary has had a major impact on the disability programs, shaping the procedures and standards adhered to by SSA, and generally nudging the system in the direction of expanded eligibility.[147]

146(continued)
irregular (17,711 in FY 1985; 11,993 in FY 1984). Many of these were mandated by the 1984 legislative changes in medical improvement standards and by the resolution of major class actions. Data provided by SSA.

In FY 1986, 8,604 final court decisions were reached in SSA disability cases. There were 4212 affirmations, 3308 reversals and 1084 dismissals. In addition, there were 9143 court remands in FY 1986. At the end of FY 1986, 47,334 disability cases were pending in federal courts. SSA, supra note 11, at 33.

Going further back in time, statistics reveal that US district courts took action favorable to the claimant in 41.1% of the time in FY 1958, 33.7% in FY 1960, 31.3% in FY 1965, and 26% in FY 1970. US Department of Health, Education, and Welfare, Briefing Pamphlet for the Bureau of Hearings and Appeals, June 30, 1971, p. 24.

Disability cases quickly became the most important component of the SSA federal court litigation load, after the RSDHI disability program was inaugurated in 1954, and especially after monthly disability benefits became payable in 1957. In 1955, 58 civil suits were brought challenging Title II denials; none involved disability. In 1956, 10 of 79 civil actions (13%) concerned disability; comparable figures for other early years were: 1957, 40 of 90 (44%); 1958, 120 of 203 (59%); 1959, 426 of 542 (79%). Report to the Secretary from SSA Commissioner Mitchell, Sept. 6, 1960, p. 1.

[147] Weinstein, supra note 82, passim; 1981 Hearing, supra note 1, at 11; Stone, supra note 1, at 152-61; Liebman (1976), supra note 20, at 845 (court's freedom to ignore operation of disability program as a whole, and aggregate financial consequences of expanding eligibility standards, incline judges toward allowances). Contra Mashaw, supra note 1, at 186 (judicial review has had only minor impact on the bulk of administrative decisions); L. Liebman and R. Stewart, "Bureaucratic Vision," 96 Harvard L. Rev. 1952, 1959 (1983) ("Thus, the ALJs and the judges reverse particular denials, but do not make the law of the system.")

6. Observations

The preceding description of the standards and procedures for handling RSDHI and SSI disability claims prompts a series of observations, which may provide helpful generalizations for considering the work of the Appeals Council.

a. The SSA disability mechanism is responsible for receiving, documenting and adjudicating a staggering number of claims each year. At every tier of the appeals process, the volume of traffic is a key driving force behind SSA procedures: the DDS apparatus must cope with almost two million initial application and reconsideration actions each year; the SSA ALJs collectively churn out more case decisions annually than the whole of the federal Article III judiciary;[148] the federal courts have become the final resting place for 10,000 claims each year.[149]

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[148] Weinstein, supra note 82, at 900.

Of the 1003 ALJs that were employed by the federal government as of July 21, 1987, 673 (67%) were in SSA. Letter to authors from Appeals Council Member William Taylor, July 31, 1987.

SSA has long been the federal government's leading institution for ALJs. In 1980, SSA had 698 ALJs, and the next highest agency totals were: National Labor Relations Board 115, Department of Labor 66, Interstate Commerce Commission 55, Occupational Safety and Health Review Commission 48. SSA housed approximately 60% of the government's 1146 ALJs. Cofer, supra note 1, at 14. Although SSA employed only 6.6% of the federal ALJs in June 1947 and only 7.2% in June 1954, its share grew to 33.2% in July 1962 and 54.4% in February 1974. Lubbers, "A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level," 65 Judicature No. 5, p. 266, 268 (Nov. 1981).

[149] In 1986, Social Security cases represented 21% of the federal courts' civil docket where the United States was a party. This was 5% of the federal courts' total civil docket. (Comparable figures for 1984 were 37% and 12%, respectively.) Gonya, supra note 145.

This volume of cases has prompted numerous proposals to establish a dedicated "Social Security Court" (or a "Disability Court") which would have jurisdiction over all disability appeals from a final order of the Secretary of HHS. Advocates of this institution claim that it would free the district courts from a substantial burden and promote national uniformity in the implementation of disability law.

(Footnote continued)

The level of effort for these cases is unprecedented: no other administrative agency processes anywhere near the same number of cases that engorges SSA annually.[150] Moreover, while the surge in the disability caseload appears to have crested, there is no indication of retreat in the powerful economic, social and medical factors which originally created it.[151] To the contrary, the enormous volume of disability adjudications is probably destined to be a permanent feature of the SSA landscape.

Concomitant with the volume of cases is the proliferation of SSA decisionmaking units, including 19,000 staff members in more than 1300 district offices; 4300 disability examiners in 111 DDS branches; and 700 ALJs in 132 hearing offices.[152] The task of establishing any degree of consistency and national uniformity among such diverse and far-flung individuals is daunting.

b. The nature of the typical disability case and process is similarly distinct from most other administrative fare. Disability cases are extremely fact-based: although there is a dense thicket of statutory and regulatory law, SSA adjudicators generally feel that their sole task is to apply known law to new facts, not to make policy, to extrapolate to unforeseen areas, or to enlarge the various pigeon-holes into which cases are slotted.

149(continued)
Opponents assert that the true burden on the federal judiciary is overstated, because disability cases tend to be resolved relatively quickly and easily, and that recourse to a "generalist" district court is an important safeguard for claimants, whose interests would be less searchingly protected by "specialists" on a disability bench. Ogilvy, "The Social Security Court Proposal: A Critique," 9 J. of Legis. 2, p. 229-251 (Summer 1982); Arner, "The Social Security Court Proposal: An Answer to a Critique," 10 J. of Legis. 2, p. 324-50 (Summer 1983); Rains, "A Specialized Court for Social Security? A Critique of Recent Proposals," 15 Florida St. L. Rev. No. 1, p. 1 (Spring 1987); "An Address by Justice Antonin Scalia, United States Supreme Court," 34 Federal Bar News & Journal No. 6, p. 252 (July-Aug 1987); 1981 Hearing, supra note 1, at 13-14; R. Pear, "New Court Sought for Benefit Cases," N.Y. Times, Mar. 9, 1986, p. 1.

[150] 1983 ACUS Report, supra note 2, passim.

[151] Weinstein, supra note 82, at 904.

[152] HHS Commission on the Evaluation of Pain, supra note 36, at 49.

To the extent that one can describe bipolar models of agency decisionmaking,[153] SSA is structured to present the paradigm of the "judicial" style of neutral adjudication based upon objective determination of descriptive facts, rather than the "political" style of focussing upon the identity of interested parties and the intensity of their respective concerns. This is not to imply that SSA is above politics,[154] but the nature of the typical disability case -- requiring a fine parsing of intimate facts of one person's daily existence -- necessarily tilts the system and its implementers in the direction of fine-grained attention to the factual record, rather than to the reform of social policy.

c. In addition to being grounded largely in the facts, rather than the law, the SSA disability caseload is noteworthy for several other unusual characteristics. First, it tends to be quite complex, requiring the adjudicator to be familiar with a wide range of medical and vocational sources and concepts, as well as a substantial body of statutes, regulations, SSA rulings and SSA implementing policies. The decisionmaker must ordinarily master a substantial file of medical records, replete with references to obscure impairments and arcane scientific jargon, and be able to apply medical (including psychiatric) evidence to a vocational setting. In short, the fact that the cases are relatively confined in scope has not made them easy to comprehend.[155]

Second, the cases, albeit small from a social viewpoint,[156] are terribly important to the individual recipient, often providing the barest cushion against absolute economic deprivation. Moreover, SSA benefits (at least for the RSDHI program) are seen as an "earned entitlement," not as social welfare; they are insurance benefits for which the worker has paid over a lengthy period of time.[157] The claimant therefore presents as a party to a contract, not as a supplicant for the dole,[158] and the cases are typically contested vigorously.[159] There is, for many claimants, little to lose in filing or appealing a case, and a powerful incentive to do so.

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[153] 1983 ACUS Report, supra note 2 at 117.

[154] There have been frequent proposals to take SSA out of the Department of Health and Human Services and make it an independent agency, as well as to remove it still further from the unified federal budget. Advocates contend that these restructurings would insulate SSA from the caprice of economic and political factors properly affecting the rest of the government. See D. Koitz, "Social Security: Legislation to Create an Independent Agency," Congressional Research Service, Library of Congress, Issue Brief No. IB86120 (Aug. 18, 1986). See also National Center Study, supra note 1, at 58, 71 (SSA receives over 100,000 inquiries from congressional offices and distorts its usual notification procedures in order to be responsive.)

[155] Stone, supra note 1, at 166 (quoting former Commissioner Ball as stating that the medical criteria of the listings are "so necessary to the program, but give us the most trouble" and paraphrasing former Commissioner Cardwell that the vocational criteria are "impossible to specify but we do it anyway").

A third characteristic of SSA disability cases is their

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156 On the average, an RSDHI claimant receives $488 per month, and an SSI recipient substantially less. On the other hand, these figures can add up quickly on an actuarial computation, so that the total present value cost of awarding permanent monthly benefits to a worker disabled at age 50 may exceed $100,000. HHS Commission on the Evaluation of Pain, supra note 36, at 165. In addition, the value of associated services (Medicare, rehabilitation) may be substantial.

157 Liebman suggests a continuum of social welfare programs, from those generally considered most legitimate (such as RSDHI) to those carrying more stigma (such as SSI). Disability programs are typically seen as being further toward the "honorable" end of the spectrum -- as having been "earned" or at least having eligibility be beyond the manipulating control of a victim of medical disaster. Liebman (1976), supra note 20, at 857.

158 In addition, there is standard language used by many reviewing courts, to the effect that the Social Security Act is a remedial statute and must be construed liberally. See, e.g., Damon v. Sec'y of HEW, 557 F.2d 31,33 (2d Cir. 1977); Mandrell v. Weinberger, 511 F.2d 1102, 1103 (10th Cir. 1975).

159 One unfortunate, but probably not uncommon, exception to the generalization about vigorous pursuit of a claim occurs when one symptom of the claimant's impairment, such as a disabling mental condition, operates by itself to prevent him or her from engaging in such focussed, goal-oriented behavior, or even from retaining (and cooperating effectively with) a representative to pursue the matter. Similarly, an uneducated or illiterate individual may be intimidated by the SSA bureaucracy and by the rigor and complexity of its rules, and cowed into dropping a meritorious case.

inherent subjectivity. It may be impossible ever to "know" another person's impairments and judge them objectively; certainly many of the most compelling and damaging disabling conditions -- pain, for example[160] -- elude outside measurement.[161] Social Security disability law explicitly eschews judgments made on the "average person" basis; instead, each claimant is entitled to individualized case-by-case analysis.[162] SSA decisionmakers, therefore, of necessity make -- or should make -- credibility judgments in every case.

The fact that typically only the ALJ stage proceeds as a face-to-face confrontation between claimant and adjudicator makes this credibility judgment much more difficult but no less important. In many instances, moreover, a disability case turns fundamentally upon the decisionmaker's subjective sense of the expertise, reliability and credibility of a treating physician, consultative examiner or other expert whose opinion is offered only through documents, not by oral examination under oath.[163] Despite the fact that the disability programs have traditionally been presented to the public, and "sold" to the Congress, as incorporating exclusively an "objective," "medical" assessment,[164] in reality the definition of disability necessarily embraces a variety of vocational, economic, social and political considerations, making close cases frequent and ineffably complex.[165]

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[160] See HHS Commission on the Evaluation of Pain, supra note 36, passim; Institute of Medicine, supra note 83, passim.

[161] Liebman and Stewart, supra note 147, at 1957 ("It is doubtful that there can be any "correct" disposition of individual cases presenting such [disability] questions."); Weaver, supra note 111, at 49 (comparing the difficulty of determining the occurrence of the insured contingency in the disability program and the retirement and survivors programs).

[162] Stone, supra note 1, at 159; Capowski, supra note 64, at 349 (grids have been criticized for departing from individualization and adopting "average man" concept). The listings, too, are at least in part directed to the impact of a condition upon an "average" person, independent of the actual effects upon a particular claimant.

[163] Some judgments required of SSA decisionmakers are (or are usually) straightforward: in the typical case, assessments of a claimant's age and education, for example, are unproblematic, and many of the listings are defined with a level of detail that leaves relatively little scope for individual flexibility. Other listings, however (e.g., those defining mental impairments or substance abuse), and the assessment of an individual's "residual functional capacity" often require, at base, the rendering of subjective opinions.

d. The preceding description also prompts the observation that the SSA claims adjudication structure is surprisingly procedure-laden. A claim may traverse four administrative and three judicial decisionmaking levels (not counting possible remands) before running its course over two or more years. Claimants are given numerous "bites at the apple," including three stages which are explicitly de novo.

There is, moreover, a profound variation in the award rates of the various tiers of review, with the probability of success fluctuating as one climbs the appellate ladder.[166] The system

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164 See Cofer, supra note 1, passim.

165 Liebman (1976), supra note 20, at 850 (inability to work may truly be attributable to a combination of medical handicaps and adverse labor market conditions).

166 There has been variability within each tier of review, as well as across tiers. At the initial determination level in 1986, for example, 52.6% of the claimants in Massachusetts, and 52.2% in Connecticut, were allowed, while comparable award rates for Louisiana and West Virginia were only 28.3% and 28.6% respectively. Allowances at the reconsideration level ranged from a high of 31.5% in Massachusetts to a low of 6.9% in Mississippi. ALJ award rates ranged from 71.1% in Hawaii and 71.6% in Montana to 45.5% in Michigan, Iowa, and Alaska. Finally, federal court allowances varied from 50.9% (for Region VII--Iowa, Kansas, Missouri and Nebraska) to 24.8% (Region VI--Arkansas, Louisiana, New Mexico, Oklahoma and Texas). Disability Advisory Council Briefing Book, reprinted in 9 Social Security Forum No. 5, p. 7-8 (May 1987). Similar variability is reported in S. Kochlar, "Appeals under the SSI Program: January 1974-August 1976," 42 Social Security Bulletin No. 4, p. 24 (Apr. 1979) (reconsideration award rates ranged from 46.9% in Alaska to 17.6% in New Hampshire; ALJ award rates ranged from 64.8% in Kansas to 24.5% in Connecticut); Senate Finance Committee, supra note 1, at 52-3; National Center Study, supra note 1, at 21-4.

Some of the variability in award rates may be due to the fact that the record remains open throughout the early stages of administrative appeal, and the ALJ is typically dealing with a much more comprehensive set of medical

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thus tends to reward the persistent, fostering the notion that a claimant (or claimant's representative) who has the endurance to battle the system may eventually fare better than a more-disabled but less-tenacious counterpart.

e. Less obvious from the forgoing recital of background data -- but perhaps underlying much of it -- is the political fact that SSA (and the disability programs no less than others) has become a hotly, often bitterly, contested battleground. On the national level there are regular alarums about the programs and their respective trust funds being "in crisis."[167] On the bureaucratic level, there has been intense acrimony within the program units, especially within the Office of Hearings and Appeals, as ALJs and others resist what they have seen as policymakers' attempts to compromise their decisional independence under the guise of promoting efficiency and productivity.[168] SSA was once commonly

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records and other documents than is available to the DDS. Similarly, the Appeals Council may be provided with materials that were not before the ALJ.

However, a great deal of the variability is also due to the different attitudes, procedures or "mind sets" of the various decisionmakers. In one SSA study, three different sets of reviewers, from DDS, ALJ and SSA Office of Assessment groupings, came to very different results even when confronted with the same cases. Bellmon Rep., supra note 1, passim; National Center Study, supra note 1, at 3.

[167] Report of the National Commission on Social Security Reform, January 20, 1983; Stone, supra note 1, at 186-92; W. Achenbaum, Social Security: Visions and Revisions, (1986).

[168] The tensions inside OHA, particularly between the ALJs and the series of Associate Commissioners, have been examined in a number of studies and several lawsuits. In many instances, the gist of the controversy is how far OHA leadership may proceed in administratively organizing and streamlining the handling of cases without impermissibly compromising the quality and independence of the ALJs. This is an exceptionally difficult line to draw, and controversy has reigned since at least 1975. Cofer, supra note 1, passim; 1981 Hearings, supra note 1, passim; Rosenblum, supra note 125, passim; Chassman & Rolston, supra note 1, passim; City of New York v. Heckler, 578 F. Supp. 1109 (E.D.N.Y. 1984), aff'd 742 F.2d 729 (2d Cir. 1984), aff'd sub nom Bowen v. City of New York, 476 U.S. 467, 106 S.Ct. 2022 (1986); Ass'n of Administrative Law Judges v. Heckler,

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cited as "an agency at war with itself";[169] if the skirmishes have now abated or been driven underground, a substantial reservoir of mutual suspicion and hostility lingers nonetheless.[170]

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594 F. Supp. 1132 (D.D.C. 1984); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Settlement agreement in Bono v. SSA, recorded in US District Court for the Western District of Missouri, No. 77-0819-CV-W-4, June 7, 1979; letter from Gregory J. Ahert, Director, Human Resources Division, US General Accounting Office, to Senator Max Baucus, June 2, 1981, regarding "Social Security Administration Policies for Managing Its Administrative Law Judges."

[169] 1981 Hearings, supra note 1, at 20.

[170] The various components of OHA (policymakers, ALJs, members of the Appeals Council, the union of OAO analysts, etc.) appear now to be on somewhat more harmonious terms than, for example, during the height of the CDR caseload explosion. In our interviews, however, we still found a substantial amount of latent distrust.

C. The Appeals Council

1. Legal Authority

There is no explicit statutory requirement for an Appeals Council; indeed, the only even implicit statutory mandate for further post-ALJ administrative review of a disability claim is:

> "The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for administration of this chapter.[171]

The Appeals Council was created by rulemaking procedures and is now governed by a handful of regulations contained at 20 C.F.R. §§404.967-83 (for RSDHI) and §§416.1467-83 (for SSI).[172] These generally define the circumstances under which the Appeals Council will review a case,[173] the procedures to be followed before the Appeals Council,[174] and the claimant's recourse to federal court after a final adverse decision of the Secretary.[175]

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[171] 42 U.S.C. §§405(b)(1), 1383(c)(1) (1982). The statute also warrants the Appeals Council performing the final agency review function for the Secretary: "The Secretary is authorized to delegate to any member, officer or employee of the Department of Health and Human Services designated by law any of the powers conferred upon him by this section...." 42 U.S.C. §405(1).

There is a statutory requirement for SSA review of a number of ALJ awards under the Bellmon Amendment, Sec. 304(g) of Pub. L. No. 96-265, but even this would not necessarily have to be performed by the Appeals Council -- the function could be delegated elsewhere.

Another statutory provision guiding the work of the Appeals Council is Section 557(b) of the Adminstrative Procedure Act, establishing the standards for agency review of a hearing decision, and stating that in its review the agency retains "all the powers which it would have had in making the initial decision." 5 U.S.C. §557(b) (Supplement III, 1985).

[172] Additional Appeals Council procedures are described at 20 C.F.R. §422.205 (1986).

[173] 20 C.F.R. §§404.970, 416.1470 (1986).

[174] 20 C.F.R. §§404.976, 416.1476 (1986).

The Appeals Council is also governed by norms inferior to the statute and regulations. These include "Social Security Rulings," which are interpretive statements, based upon statutes or recent decisions by courts, SSA policymakers, ALJs, the Appeals Council, and others.[176] SSA generates and disseminates SSRs (but does not publish them in the Federal Register) and collects them quarterly and annually.[177] The status of these Rulings is somewhat ambiguous. SSA says that Rulings "do not have the force and effect of the law or regulations, but are to be relied upon as precedents in determining other cases"[178] and that a Ruling "is binding on all components of the Social Security Administration."[179] Many ALJs, on the other hand, do not consider rulings binding upon them, since SSRs are not promulgated via APA notice-and-comment rulemaking procedures.[180]

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[175] 20 C.F.R. §§404.981, 416.1481 (1986).

[176] Social Security Rulings on Federal Old-Age, Survivors, Disability, Supplemental Security Income, and Black Lung Benefits, Cumulative Edition, 1986, p. iii. A Ruling may also be based on opinions of the Office of the General Counsel, Commissioners' decisions, and "other interpretations of the law and regulations." Id.

[177] SSA has used "Policy Interpretation Rulings" (formerly called "Program Policy Statements") as a vehicle to inform SSA adjudicators quickly about clarifications or interpretations in an operational policy. These rulings or statements were eventually published in the quarterly Rulings. However, the use of Policy Interpretation Rulings is being discontinued because SSA has decided to publish the Rulings as frequently as necessary, instead of quarterly.

[178] Social Security Rulings, supra note 163, at iii.

[179] Id; 20 C.F.R. §422.408 (1986).

[180] 5 U.S.C. §553 (1982). ALJs frequently consider themselves bound by statute, case law and published regulations only, and conclude that SSRs -- at least those which are "substantive", rather than merely "interpretative", are not law. The Appeals Council and SSA are equally adamant that SSRs are binding on all components of the agency.

There is a complex history regarding the applicability to SSA of APA standards regarding rulemaking. HHS and SSA, like other federal agencies, have always been within the ambit of the APA, but the exception in section 553 of the act, covering "public property, loans, grants, benefits, or

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SSA also maintains the Program Operations Manual System (POMS), which collects standard policies and operating procedures for internal SSA use. The POMS -- which is not "published" under APA standards but is generally available for public review at SSA offices -- is designed to provide interstitial guidance to district offices and DDSs where the statute and regulations are incomplete. It supplies step-by-step guidance for the process of developing a claims file, helping to ensure national uniformity in the implementation of SSA practices. By its own terms POMS is not directly applicable to the ALJ or Appeals Council stages of the claims process, but its contents do help shape the case file that may be presented for appellate review; the DDSs certainly feel bound by POMS' strictures. The POMS statements are intended to be interpretive only; there has nevertheless been controversy over instances where POMS might be read as imposing new, unpublished substantive standards restricting eligibility for benefits.[181]

The SSA Office of Hearings and Appeals (OHA) also maintains

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contracts," tended to exempt much of HHS (especially SSA) rulemaking from the requirements of notice and comment. In 1971, Secretary of HEW Eliott Richardson had the department voluntarily eschew that exception. 36 Fed. Reg. 2532 (Feb. 5, 1971).

A 1982 proposal that would have rescinded the Richardson memorandum (47 Fed. Reg. 26860 June 22, 1982) was officially withdrawn after public opposition arose. The 1984 amendments then underscored the requirement that SSA must utilize notice and comment procedures for all major disability policies.

181 Schweiker v. Hansen, 450 U.S. 785 (1981) (SSA claims manual has no legal, binding force); Salling v. Bowen, 641 F. Supp. 1046, 1052-3 (W.D. Va. 1986); Bloch, supra note 1, at 225; Cofer, supra note 1, at 125. The 1984 Disability Act requires SSA to publish all major disability policies under the APA's notice-and-comment procedures. Beyond that, the Congressional Conference Committee which considered the 1984 Amendments noted "while it is not required in the legislation, the conferees urge the Secretary to publish under the APA public notice and comment rulemaking procedures all OASDI and SSI regulations which relate to benefits." 130 Cong. Rec. H9831 (Sept. 19, 1984).

The POMS now runs to over 40,000 pages, and efforts are underway to streamline and reduce it. SSA Commissioner Dorcas Hardy, Memorandum on POMS, January 6, 1987, p. 1.

an "OHA Handbook," providing similar types of procedural guidance to ALJs and the Appeals Council. As with the POMS, the avowed purpose of the Handbook is to implement, not to alter, basic disability law, but, again, the dividing line between those two functions is not always bright.[182]

SSA does not consider its previous decisions in disability cases -- whether reached by a DDS, ALJ or Appeals Council -- to be of precedential value. OHA does circulate noteworthy decisions in the OHA Law Reporter, published quarterly, but this "is not to be considered an authority which can be cited, but rather an informative aid which may lead to individual research."[183] Selected administrative cases are displayed with identifying details redacted.

Finally, it should be noted that SSA's posture vis-a-vis decisions of federal courts remains controversial (and largely outside the scope of this study). Under prior policies, SSA would accept as binding the decisions of the U.S. Supreme Court, but also asserted the authority to "non-acquiesce" in an adverse decision of a circuit court of appeal. In a non-acquiesence situation SSA would implement the adverse order in the case at bar, but would decline to give it prospective applicability in other cases even within the same circuit. In June and December of

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[182] Office of Hearings and Appeals Handbook, provided to authors July, 1987. The OHA Handbook comprises a multi-volume series of loose-leaf binders, Part 5 of which is applicable to the Appeals Council. The contents of the handbook have been irregularly updated via issuance of replacement or additional insert pages. At least Part 5 of the Handbook, however, has largely fallen into desuetude, with very few updates issued during the past five years (despite substantial alteration in the operation of the Appeals Council) and it is no longer relied upon for day-to-day guidance, as various staff memoranda and circulars have filled the void. Reportedly, a revision of the OHA Handbook is underway. Office of Management Analysis, Planning and Innovation, "Office of Appeals Operations Management Survey Report," Dec. 1986, p. 36.

[183] 11 OHA Law Reporter 1, unnumbered preface page (Jan. 1987). The OHA Law Reporter publishes selected Appeals Council decisions and remands, ALJ decisions, federal court cases, Appeals Council minutes, Social Security Rulings, Federal Register Notices, and other materials. It carries a disclaimer that "material herein does not necessarily represent the official policy of the Office of Hearings and Appeals, the Social Security Administration or the Department of Health and Human Services," Id.

1985, SSA changed its policy to one of "acquiesence." Now, if a circuit court decision is at variance with an agency policy, SSA issues an "Acquiesence Ruling," advising agency adjudicators and claimants within that circuit about how SSA will implement the court's decision there. SSA reserves, of course, the right to appeal the issue, or to relitigate it in the same or other circuit courts.[184]

2. History

The Appeals Council was established in January, 1940, by the Social Security Board, which at that time administered the provisions of the Social Security Act.[185] The original charter established a three-person Appeals Council, appointed February 13, 1940, with responsibility for directing and supervising referees (later, ALJs) and for reviewing their hearing decisions.[186] Cases began trickling into the Appeals Council in July, 1940.

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[184] "Interim Circular No. 185" for inclusion in OHA Handbook, June 3, 1985; Social Security Rulings, supra note 176, at iii; Proposed regulation, 52 Fed. Reg. 15, p. 2557 (Jan. 23, 1987).

SSA's non-acquiesence practice had been criticized as a flagrant violation of judicial authority, and defended as a necessary concomitant of a national program which (as with the Internal Revenue Service or the National Labor Relations Board) used non-acquiesence to promote uniformity. Lauter, "Disability-Benefit Cases Flood Courts," 6 National Law J., No. 6, p. 1 (Oct. 17, 1983); Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985) vacated on other grounds, 801 F.2d 29 (2d Cir. 1986); Heaney, supra note 83, at 9.

Between January, 1986 and April, 1987, SSA issued 26 acquiescence rulings, 21 of which have addressed retirement and survivors issues; none of the disability-related acquiesence rulings have concerned critial matters. Statement by Rep. Bill Archer, 133 Cong. Rec. E1507, April 23, 1987.

[185] The initial legal authority for the Appeals Council came in a set of "Basic Provisions Adopted by the Social Security Board for Hearings and Review of Old-Age and Survivors Insurance Claims," Jan. 1940. This document elaborated 14 provisions regarding the procedures and structures for adjudicating claims, long before the enactment of the disability programs. Provisions 9-11 dealt with the Appeals Council, establishing it as the supervisory structure for referee (ALJ) proceedings.

The outstanding early history of the hearings and appeals structure is C. Horsky and A. Mahin, "The Operation of the Social Security Administration Hearing and Decisional Machinery," (1960) (mimeo on file with authors) p. 293 et.

(Footnote continued)

When the Social Security Board was abolished in 1946, its functions were transferred to the Administrator of the Federal Security Agency, who in turn delegated most of those powers to the Commissioner of Social Security. The Appeals Council, however, remained intact, and thus began the tradition under which the Appeals Council receives its mandate directly from the Secretary (or head of the Department) rather than from the Commissioner.[187]

In 1953 the Federal Security Agency was folded into the new Department of Health, Education and Welfare,[188] and the Appeals Council was bureaucratically located within the Office of the Commissioner of SSA.[189] Delegation of authority over hearings and

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185(continued)
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[186] Id. The original three members of the Appeals Council were Joseph McElvain (Director), John J. Deviny and Ernest R. Burton.

[187] Horsky, supra note 185, at 294-95; Reorganization Plan No. 2 of 1946, transmitted to Congress May 16, 1946, pursuant to Reorganization Act of 1945, approved December 20, 1945; Agency Order No. 57, issued July 16, 1946.

[188] Horsky, supra note 185, at 296.

[189] 20 Fed. Reg. 1997, Sec. 8.10 (Mar. 30, 1955); superseded by 22 Fed. Reg. 1050 §8.10 (Feb. 20, 1957).

In effect, the Appeals Council was merely reorganized as the Office of Hearings and Appeals in August, 1959. That is, instead of putting a previously-independent Appeals Council underneath the mandate of an Associate Commissioner who already had other responsibilities, the real reform was to merge additional duties into the Appeals Council. The head of the Appeals Council became an office director -- not subordinate to one. Only later did the "other" duties of the Associate Commissioner overwhelm those associated with the Appeals Council. Department of HEW, "Briefing Pamphlet for the Bureau of Hearings and Appeals," June 30, 1971, p. 9; letter to Rep. Eugene J. Keogh from Alvin M. David, Director, Division of Program Evaluation and Planning, July 3, 1964 (responding to Congressional inquiry regarding the rationale for placing the Appeals Council under the

(Footnote continued)

appeals, however, continued to flow from the Secretary directly to the Appeals Council.[190]

Even today, the Associate Commissioner for Hearings and Appeals exercises only "administrative direction" over the Appeals Council, and members are to exercise "independent judgment," with "complete decisional authority for all programs within the jurisdiction of the" Appeals Council.[191] The bureaucratic relationship between the Secretary, the Commissioner, and the Appeals Council is a factor frequently cited by members in underscoring the Appeals Council's status and autonomy.[192]

The Appeals Council has grown irregularly in size, from its

189(continued)
Commissioner instead of within the Office of the Secretary.)

[190] 20 Fed. Reg. 1997, Sec. 8.20(b) (Mar. 30, 1955). Among the express delegations from the Secretary to the Appeals Council are: 33 Fed. Reg. 5837 (Apr. 16, 1968) (authority to review Title II and Title XVIII hearings); 34 Fed. Reg. 6985-86 (Apr. 26, 1969) (same); 35 Fed. Reg. 7033-34 (May 2, 1970) (Black lung cases); 38 Fed. Reg. 15648 (June 14, 1973) (SSI cases); 39 Fed. Reg. 27746 (July 31, 1974) (same); 40 Fed. Reg. 21062 (May 15, 1975) (Medicare); 40 Fed. Reg. 25080 (June 12, 1975) (same); 40 Fed. Reg. 27506 (June 30, 1975 (same); 43 Fed. Reg. 26615 (June 21, 1978) (same).

[191] Horsky, supra note 185, at 300; OHA Handbook, supra note 182, at 5-10.

More properly, since the Associate Commissioner serves in a dual capacity as a) director of the Office of Hearings and Appeals and b) Chair of the Appeals Council, he or she provides only administrative direction in the former capacity, while retaining the right to exercise greater substantive leadership in the latter role.

The Appeals Council, and all of OHA, have been somewhat aloof from the other components of SSA. As recently as 1985-86, OHA was accorded a special bureaucratic status, reporting directly to the Commissioner, until it was again placed within the jurisdiction of the Deputy Commissioner for Programs. Even today, however, there is strikingly little contact between the Appeals Council members and other related offices.

[192] This factor was mentioned often in our interviews with Appeals Council members. See also Cleveland transcript, supra note 1, at 266.

original complement of three members in 1940, to six in 1956, eight in 1959, seven in 1960,[193] and nine in 1975. In 1976, the Council was increased to 14 members; by 1983 it had grown to its current strength of 20.[194]

To date, the Appeals Council has received relatively little public critical scrutiny, as most observers have focused attention on other, more visible aspects of the bureaucracy, such as the DDS or ALJ. The Appeals Council remains, therefore, to a large extent a subject of confusion and uncertainty among outside observers,[195] even including many who are intimately familiar with other aspects of the SSA process.

3. Composition

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[193] Horsky, supra note 185, at 311-12.

[194] Letter from Appeals Council member William Taylor, June 25, 1987, on file with authors.

[195] The conspicuous exceptions to this generalization are two works by Professor Jerry Mashaw, supra note 1, which provide searching reviews of the operation of the Appeals Council. NOSSCR, supra note 1, at 15-50 to 15-59, is also useful. Most other analysts, including Bloch, supra note 1, at 246-47, 287-91, and Legal Counsel for the Elderly, supra note 1, at 55-56, simply summarize the applicable regulations concerning the Appeals Council.

Other inquiries into the operation of SSA generally, and the Office of Hearings and Appeals in particular, have not highlighted the Appeals Council. See Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, "Recent Studies Relevant to the Disability Hearings and Appeals Crisis," 94th Cong., 1st Sess., (Dec. 20, 1975), passim; Center for Administrative Justice, "Final Report of Study on the Social Security Administration Hearing System," (Oct. 1977), passim; Bellmon Rep., supra note 1, passim; 1983 Hearing, supra note 1, passim; President's Private Sector Survey on Cost Control (Grace Commission), "Report on the Department of Health and Human Services, Social Security Administration," (1983), passim; Cleveland transcript, supra note 1, passim; 1986 Hearing, supra note 1, passim; General Accounting Office, "Administrative Law Process: Better Management Is Needed" (FPCD-78-25, May 15, 1978), passim; General Accounting Office, "Management Improvements in the Administrative Law Process: Much Remains to be Done" (FPCD-79-44, May 23, 1979), passim; and studies identified in Cofer, supra note 1, at 76-80.

The Appeals Council is today composed of 20 members,[196] plus the Associate Commissioner for Hearings and Appeals (who serves as Chair of the Appeals Council)[197] and the Deputy Associate Commissioner (who is an ex officio member).[198] One member is designated the Deputy Chair and manages the day-to-day operations of the Appeals Council.[199]

The selection process for new members begins with the posting of a "merit promotion vacancy announcement."[200] The job description requires that an applicant have seven years of progressively more responsible experience as a member of the bar involved in the preparation, presentation, or hearing of formal cases before courts or governmental regulatory agencies.[201]

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[196] Throughout early 1987 there were two prolonged vacancies on the Appeals Council; both were filled during summer, 1987.

The Appeals Council has been bolstered, from time to time, by the addition of one or more ALJs who join the Appeals Council for a 30-day temporary duty assignment and take cases as a regular member. This program was terminated in March, 1987 for budgetary reasons.

[197] The Associate Commissioner ordinarily is occupied with other duties and does not regularly participate in the work of the Appeals Council.

[198] The Deputy Associate Commissioner used to be a Co-Deputy Chair of the Appeals Council, but no longer has the title. Deputy Associate Commissioners vary in the degree of "hands-on" involvement in the work of the Appeals Council.

[199] There have been only two operational Deputy Chairs of the Appeals Council, Irwin A. Friedenberg from 1976 to 1980 and Burton Berkley from 1980 to the present. Prior to 1976, when the caseload, and the Appeals Council itself, were smaller, the Associate Commissioner (then called a Bureau Director) or the Deputy Associate Commissioner provided the day-to-day leadership of the Appeals Council.

[200] The vacancy announcement may be advertised only inside SSA, within the entire Department of Health and Human Services, or more broadly. The wider the search field, the longer search process required. In early 1987, in the interest of filling two vacancies expeditiously, the Appeals Council advertised only within HHS.

[201] Prior to 1976, the standards for appointment as a member of the Appeals Council did not require that the appointee be an

(Footnote continued)

A "Best Qualified" list of applicants who meet the minimum credentials is then reviewed by the Deputy Chair, who interviews some applicants, checks references, and makes a recommendation to the Associate Commissioner of OHA. Although this recommendation must ultimately be approved by the Deputy Commissioner for Programs, as well as by the Commissioner, in practice it is the Deputy Chair (with a varying degree of involvement by the Associate Commissioner) who makes the selection.

There has been strikingly little partisan "political" input in the selection process: there are no instances of pressures to appoint political cronies or to exclude applicants based on political persuasions. Numerous sources confirm that the selection process is traditionally based on merit among career civil servants, rather than on loyalty to a particular person or ideology.[202] Similarly, we discovered no instances where a member has been forced, or even asked, to resign from the Appeals Council.[203]

The current members of the Appeals Council include six women, three blacks, and one Hispanic.

201(continued)
attorney. At present, all members of the Appeals Council are attorneys.

The original philosophy of SSA procedures was that attorneys were not necessary in order to assure fairness, and that their presence might make the enterprise more formal and adversarial than it should be. It was deliberate, therefore, that seven of the original referees (ALJs) and one of the first three members of the Appeals Council, were without legal training. Attorney General's Committee on Administrative Procedure, Monograph No. 16, "Social Security Board", Apr. 1940, p. 38.

[202] One former SSA policymaker advised us that political influence in the selection of Appeals Council members was unlikely for practical reasons: a GS-15 employee is simply so far down the government ladder that grand political machinations are not brought into the appointment process.

[203] Even the physical location of the Appeals Council seems to emphasize its independence. The Appeals Council sits in Arlington, Virginia, substantially removed from both SSA headquarters in Baltimore and HHS headquarters in Washington, D.C. (Other components of OHA, including the Associate Commissioner and the national Chief ALJ are also in Arlington.)

There is a preference for hiring new members of the Appeals Council from within or near OHA: 5 of the current members were ALJs immediately prior to appointment to the Appeals Council, 7 were in the HHS Office of the General Counsel, 4 were branch Chiefs within the Office of Appeals Operations, and 4 held other positions, mostly within SSA.[204]

The turnover among members is low: 7 current members have been on the Appeals Council more than 10 years, 6 have served 5-10 years, and 7 have served less than 5 years.[205]

The training that a new member receives varies, depending upon the person's previous experience and knowledge. Sometimes a new Appeals Council member will attend the same training course that new ALJs attend.[206]

Members of the Appeals Council are compensated at the GS-15 level, the same grade as ALJs. The Deputy Chair's position has been approved for inclusion in the federal Senior Executive Service (SES), but SSA has not yet dedicated an SES slot for this purpose.

Appeals Council members are not protected by the Administrative Procedures Act, as ALJs are.[207] They participate in the "merit pay" system and receive performance evaluations from the Deputy Chair.[208] In principle, this arrangement allows the

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[204] Data from letter dated June 25, 1987, by Appeals Council member William Taylor, on file with authors. Obviously, in a period of high caseloads, the Appeals Council benefits by bringing on board new members who will not require extensive background training before they can assume a full complement of cases.

[205] Id. In 1986, two Appeals Council members transferred to ALJ positions. OHA Operational Report, Sept. 30, 1986, p. 10.

[206] A new member might also receive additional "on the job training," such as having the Deputy Chair or a particular designee serve as the "B" member on the new member's early cases. See infra, text accompanying note 279.

[207] As noted, ALJs enjoy virtually lifetime tenure and are immune from any substantial system of performance evaluation. See Rosenblum, supra note 125, passim.

[208] Appeals Council members are evaluated on the timeliness and quality of their work. Timeliness has recently been quantified, as the new computer tracking system allows a
(Footnote continued)

OHA policymakers a substantial degree of authority over Appeals Council members, but that authority has not been exercised, at least not directly. Members have consistently reported that no Associate Commissioner has ever tried to intervene in the work of the Appeals Council, pressuring members to deny (or pay) more claims in general or any specific claim in particular.[209]

Several other observers have concurred in the assessment that members of the Appeals Council do enjoy a high degree of "de facto" protection, even without formal jurisprudential guaranties, and there are no known instances of abusive political pressure. Some have expressed concern, however, that SSA policymakers are able nevertheless to create an "adjudicative climate" which subtly and indirectly inclines the Appeals Council toward more or fewer awards,[210] noting that the Appeals Council always reflects, to

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208(continued) numerical assessment of each member's compliance with the case handling goals noted below, See infra note 268. Quality is harder to assess; the Deputy Chair samples the decisional documents of each member (he does not review the entire file) and judges them for conformity to the applicable law, clarity of explanation, and apparent basis upon substantial evidence. He asserts that he does not take into account the frequency with which a member grants or denies review, and he tries not even to calculate how often each member pays or denies a claim.

Members are then rated on a five point scale: unsatisfactory, minimally satisfactory, fully satisfactory, exemplary and outstanding. In a typical year perhaps two-thirds of the members might be rated "exemplary" and the rest "fully satisfactory."

Performance evaluations affect members' eligibility for merit pay increases as well as end-of-year bonuses, and can have a substantial financial impact.

[209] In principle, a member of the Appeals Council could be subject to discipline, including poor performance evaluation or reduced pay, for failure to adhere to the Secretary's policies. ALJs, on the other hand, are subject to discipline only through the more cumbersome process of the Merit Systems Protection Board, which, as a practical matter, provides a high degree of insulation.

[210] It is difficult to test empirically the existence and strength of any SSA-imposed adjudicative climate, because the statutory role -- and therefore the caseload and the product -- of the Appeals Council has been so different

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some extent, the interests and style of the OHA Associate Commissioner. And some have expressed the view that the Appeals Council is still perceived, at least in some quarters, as an even more partisan "arm of the Secretary."

The members of the Appeals Council are organized into four geographic groups, each of which has responsibility for all cases arising in three designated judicial circuits. (See Chart 4) Within each geographic group, the four, five, or six members divide the cases randomly and equally. (For example, member William Taylor will ordinarily be assigned one-quarter of all the cases from the first, second, and eleventh circuits; he receives all of those cases in which the last three digits of the claimant's Social Security number are 500 through 749.)[211] This

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210(continued)
during the Reagan years from what it was during the Carter Administration. The entire disability system, moreover, has undergone so many changes that it is impossible to identify any stable baseline from which to make comparative judgments.

In a recent survey of SSA ALJs, 70.1 percent (339 of 484 respondents) indicated agreement with the statement "Tacit agency pressure is placed upon SSA ALJs to hand down fewer 'reversals' during times of national governmental economic retrenchment." Cofer, supra note 1, at 211, 223.

The award rates of ALJs have not been noticeably different under different SSA leadership, but some might argue that ALJs are more insulated (both through legal protection and through geographic dispersion) against policy pressure than are members of the Appeals Council.

Members of the Appeals Council have denied feeling any direct or indirect pressure on cases, but one member told us that obviously members can "see which way the wind blows."

The Appeals Council does not ordinarily keep statistics that note the various members' respective award rates, and there seems to be no general awareness of which members are relatively "tough" or "generous." Members do seem to know, however, which other ones are more likely to take a generally skeptical or a sympathetic approach to selected types of cases.

[211] One purpose of the geographic groupings is to provide a stability and consistency enabling each member to learn the personalities, strengths, and idiosyncracies of a particular set of ALJs, district courts, OAO analysts, and others.

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means, in general, that each member receives two or three dozen new cases on a typical work day.[212]

4. Staff

Each member of the Appeals Council has an administrative assistant, who performs clerical functions. There is, in addition, an Office Manager and staff for the Appeals Council as a whole.

The main support, however, comes from the Office of Appeals Operations (OAO), a companion unit within the Office of Hearings and Appeals. OAO is housed in Arlington, Virginia, with most staff members located in the same complex (but not necessarily the same building) as the Appeals Council itself.[213]

OAO is broken into five case-handling divisions[214] and then

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211(continued)
When the geographic groupings are shifted, however, as they were in June, 1987, in an effort to equalize the number of cases assigned to each member, the sense of continuity is disrupted.

[212] The workload of the Appeals Council fluctuates dramatically. Statistics for individual members' workloads have only recently been maintained by computer, so there is some uncertainty in the figures. Members variously reported that caseloads ran approximately 300 cases per member during February, 1987, rising to almost 600 cases per member by May, 1987.

[213] There is a proposal to consolidate into one building all the OHA units, which are currently dispersed among five buildings. If the plan is approved and funded by the Office of Management and Budget, the reshuffling will occur in about two years.

[214] Divisions I, II and III handle RSDHI and SSI disability appeals where the primary issue concerns the claimant's medical eligibility. (Division III also handles health insurance issues). Division IV handles the RSDHI and SSI appeals where the issue is other than medical, such as relationship or dependency for RSDHI claims, or income or resources for SSI claims. The Division of Civil Actions has responsibility for all cases in which the claimant has filed a complaint in federal court after an adverse decision by the Appeals Council. (OAO is now experimenting with a system of "modules," in which the branch which handled the case initially will maintain responsibility over it even
(Footnote continued)

into 32 branches, each of which has responsibility for cases coming from a defined geographic location.[215] OAO houses some 320 analysts, who perform the primary review function, making recommendations which the Appeals Council members accept in the vast majority of instances.

OAO analysts are usually non-lawyers, compensated at GS-11 - 13 levels. They typically have backgrounds of prior employment within SSA: as claims representatives in a district office, as DDS employees, or as examiners from the Office of Disability Operations.[216] An OAO analyst typically reviews approximately 25

214(continued)
after the case leaves the Appeals Council and is filed in federal court, instead of automatically transferring all those cases to the Division of Civil Actions. OHA Operational Report, Sept. 30, 1986, p. 18.) There is also a Division of Support Services, with four branches, which provide varying types of assistance to the case handling division of OAO.

[215] For example, Branch 18 (within Division III) has responsibility for all appeals from the state of Alabama. A branch may handle one or a few states (or, in states which produce a large number of claims, a portion of a state.)

A branch is the basic work group for the analysts. Consultations or transfers with analysts in other branches are somewhat unusual. However, if one branch is excessively burdened with work, some of its overflow may be shifted to other branches.

At the present time, the OAO branches do not parallel the Appeals Council members' four geographic groupings. This means that a particular analyst might send files to several different members, and that a particular member might receive files from 30 or more different analysts. OHA is now in the process of revising this structure, in order to provide greater familiarity and continuity.

[216] Analysts are selected by a merit selection process which is intensely competitive: since an analyst's job would be a promotion for many SSA employees, when OAO posts an announcement for 30-40 new positions, it can expect in the neighborhood of 1200 applications.

OAO analysts typically have 5 years of prior experience within SSA. Approximately 40% are women; approximately 20% are minority.

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cases per month, although some handle twice that many, and the competitive selection process for promotion to GS-13 tends to emphasize the volume of cases produced.[217] Analysts typically

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216(continued)
The current corps of analysts is composed of approximately 200 at GS-13, 100 at GS-12 and only a few at GS-11. Turnover is traditionally low, but has increased somewhat since promotion from GS-12 to GS-13 has become tighter.

A new analyst receives four weeks of classroom training regarding the medical problems of the human body systems, the SSA appeals process, and the documentation of a disability case file. "Training Program: Hearings and Appeals Analysts," Feb. 14-Mar. 9, 1983. Each new analyst is also assigned a senior analyst "mentor" or reviewer, who provides on-the-job training and feedback. The senior analyst provides feedback on all of the new analyst's cases for three months, and reviews all work on court cases for a further six months.

Analysts typically remain with the branch for a long time. Some are eventually promoted to "branch chief" within the OAO hierarchy; others who acquire law degrees may be selected as ALJs or members of the Appeals Council.

[217] Analysts' promotion from GS-11 to GS-12 is non-competitive and relatively routine. Promotion to GS-13 and the status of "senior analyst," however, is quite competitive.

To assess analysts' productivity, each type of case is assigned a Standard Time Value (STV), taking into account its complexity and the variety of tasks it will require. For example, a dismissal of a request for review is assessed as requiring 3 hours of analyst work; processing a denial requires 3.25 hours; and reversing an ALJ decision requires 5 hours. Among the more time-consuming functions, processing a supplementary review case is ranked at 8 hours and working through an initial action on a court remand is graded at 6 hours. These standard time values are scheduled for in-depth review and revalidation shortly. See Office of Management Analysis, Planning and Innovation, "Office of Appeals Operations Management Survey Report," Dec. 1986, p. 23. (hereinafter "OMAPI Report.")

The purpose of grading analysts according to STVs (rather than just counting the number of cases on a one-for-one basis) is to prevent the emergence of perverse incentivees that might incline analysts to improve their productivity ratings by tilting in the direction of preferring quicker

(Footnote continued)

have no personal contact with the ALJ, the claimant, or a representative, performing entirely a paper review.[218]

In addition to OAO's analysts, Appeals Council members also have access to a small Medical Support Staff (three full-time physicians and a few dozen part-time consulting specialists)

217(continued)
types of case actions (which are usually adverse to the claimant).

OAO production goals establish 4 levels of performance for the analysts, and promotion possibilities are largely governed by these measures of output. The number of review-level cases handled per month by analysts has declined (FY 1983, 36 cases per month; FY 1984 34.6; FY 1985 27.3; FY 1986 18.8), due to the moratorium on CDRs, the remanding of mental impairment cases back to the DDSs, and a substantial increase in analyst time devoted to more time-consuming court cases. OMAPI Report, supra, at 19.

The numerical scoring concentrates on quantity; there is no objective measurement of the quality of the analyst's work, and no numerical scoring of accuracy. See Office of Hearings and Appeals, "Performance Standards for Hearings and Appeals Analyst," Oct. 1, 1983. Quality of an analyst's work is, however, assessed more subjectively and is a factor in evaluation for promotion.

The Office of Appraisal does perform some quality assurance review of the work of analysts, and OAO branch chiefs and Appeals Council members are in a position to review at least some of the products of the analysts they oversee. In FY 1986, the Office of Appraisal sampled 2140 analyst recommendations and found they contained the correct substantive decision 96% of the time. OHA Operational Report, Sept. 30, 1986, p. 8.

[218] One source of tactical advice for claimants' representatives urges them to attempt, at least by telephone or in writing, to develop a relationship with the analyst working on the case, to foster a more personal sense of involvement in the claimant's plight. National Organization of Social Security Claimants Representatives, supra note 1, at 15-50. There is no evidence that this type of "personal involvement" has any impact on the outcome of the case, but direct contact with an analyst may have the effect of hastening the work on the case, ensuring that the file does not become lost in the stack, or ensuring that all documents sent to the Appeals Council have, in fact, been received.

employed by the Appeals Council to inspect files referred to them when some aspect of the medical record is unclear.[219] There is also a one-person Vocational Staff, responsible for hiring vocational experts and coordinating their activities in the field.

5. Appeals Council Caseload -- "Review Level" Cases

The Appeals Council deals with claims in three different settings: at the "review level" (that is, immediately after the ALJ tier); in a "new court filing" (that is, after a denied claimant has initiated a civil action in federal district court, and SSA's answer is due); and for "court decisions" (that is, after a district judge has issued a final decision in the case, or has ordered it ordered returned to SSA for a new hearing or other administrative processing.)[220]

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[219] OHA Handbook, supra note 182, at 5-37-10.

The medical support staff is used primarily where new evidence is presented to the Appeals Council or where the ALJ appeared not to have understood the medical record. If the opinion of the medical staff is going to be relied upon by the Appeals Council as a basis for its decision, a copy of the medical staff opinion should be provided to the claimant for comment, and it is to be entered into the administrative record. Ass'n of Administrative Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984). This notice and comment procedure, however, has not been adhered to in all cases.

In addition, the Appeals Council works with OHA's "Congressional Inquiries Unit" and "Critical Case Unit" regarding high priority or emergency cases.

[220] The volume of activity in each of these three categories is indicated by the following OHA estimates of upcoming workload for the Office of Appeals Operations:

	Receipts	Dispositions
Review level cases		
FY 1986	51,100	52,000
87	73,500	70,500
88	81,500	79,500
New court cases		
FY 1986	11,850	11,860
87	15,850	15,850
88	17,350	17,350
Court remand cases		

(Footnote continued)

Although there are certain similarities in the Appeals Council's work on the different categories, the distinctions merit separate consideration. This subsection therefore describes procedures applicable to the Appeals Council's work on review level cases; subsequent subsections deal with the other two types.

a. Types of Cases. There are two primary categories of review level cases: "requests for review" (in which a claimant denied by the ALJ seeks reversal by the Appeals Council) and "own-motion review" (in which the Appeals Council reviews cases (generally ALJ awards) in the absence of any claimant appeal.)

Request for Review. A claimant who is denied, in whole or in part,[221] at the ALJ stage may request review by the Appeals Council. This request may be initiated via an SSA form or another written statement.[222] A brief or a letter of contentions, stating

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FY 1986	18,400	7,250
87	10,700	20,350
88	10,200	13,750

(Review level figures exclude Bellmon cases) OMAPI Report, supra note 217, at 24. The numbers alone do not provide a true representation of the relative burden on the Appeals Council, however, because review level cases are typically dispatched much more quickly than the other two categories, where cases are handled relatively more deliberatively.

[221] A partially favorable decision may be issued, for example, when the ALJ determines that the claimant is disabled, but that the disability commenced at a later date (or, for a "closed period" case, that the disability terminated at an earlier date) than the claimant asserts. Another type of partially favorable decision is one in which an ALJ finds the claimant disabled and financially eligible for one program (e.g., SSI) but not financially eligible for the other.

[222] When a claimant files a request for Appeals Council review of an ALJ's decision, he or she is entitled to a copy of all pertinent documents in the case file, a copy of the tape recording of the ALJ hearing, and a period of time within which to comment. If the claimant is unrepresented, or if the representative who assisted the claimant at the ALJ stage is also involved at the Appeals Council stage, the duration of the comment period is typically shorter than it would be if the claimant retains a new representative at the Appeals Council stage.

(Footnote continued)

specific objections to the ALJ's decision and citing arguments for reversal, may be filed simultaneously or later.[223] It should be noted that current regulations do not afford the claimant a "right" to Appeals Council review; the claimant merely makes a request, which the Appeals Council may dispose of in several ways, as noted below.[224]

"Own-Motion" Review. The Appeals Council also considers on its "own motion" a number of cases in which the ALJ award was favorable to the claimant.[225] Own-motion review has a checkered

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222(continued)

Some claimants' representatives have complained that the Appeals Council has become somewhat more grudging in providing copies of all exhibits and in allowing an adequate time for inspection and comment. The Appeals Council response is that there has been no change in policy regarding these matters: the claimant is to be afforded full access to the file, and standardized letters and time frames are to be used. An OAO analyst is empowered to give one extension of time; a further extension requires a member's approval. Most members are said to be relatively liberal in enlarging the time periods, if there is a showing that the claimant or representative is actually pursuing additional important evidence, rather than simply being slow in writing a brief.

[223] 20 C.F.R. §§404.968, 75, 416.1468, 75 (1986).

Some claimants' representatives have observed that the standard of practice before the Appeals Council is relatively low: claimants' representatives often see the Appeals Council as unpromising, and file a pro forma request for review simply in order to preserve the right to proceed to federal court. The cases are typically litigated much more vigorously before the ALJs and federal judges, where the probability of success is appreciably greater.

[224] The vocabulary of Appeals Council activities can be confusing. When a claimant "requests review," the Appeals Council does investigate the file to determine whether the case should be taken for possible changes. This screening, as decribed below, involves examining the complete file, reading all the exhibits, and sometimes playing a portion of the tape recording of the hearing. This process, however, is not termed "review" -- that label is reserved for the action of the Appeals Council after it has decided to accept the case for the purpose of considering alterations in it.

history: in the period prior to 1975, the Appeals Council staff routinely reviewed all ALJ allowances and most other decisions;[226] from 1975 to 1980, as case loads rose, the Appeals Council stopped taking own-motion cases, and heard only request-for-review cases;[227] since 1980, the Bellmon Amendment[228] has again required

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[225] The overwhelming percentage of own-motion cases has been review of ALJ allowances, but the Appeals Council has also considered, pursuant to its own motion authority, a small number of unappealed ALJ denial cases. In June 1984, the sampling was 2% of the denials; this level was increased to 5% in 1986, and then reduced to 2% (due to workload considerations) in early 1987. In July 1987, the program of own-motion review of ALJ denials was suspended altogether.

In FY 1986, the Appeals Council saw 483 unappealed ALJ denials and evaluated the ALJ's decision as correct 97.3% of the time. OHA Operational Report, Sept. 30, 1986, p. 8; OHA Operational Report, Sept. 30, 1983, p. 5.

[226] Own-motion review was held to a strict standard of overturning an ALJ's award only in instances of "gross error." The Appeals Council reversed 1% of the ALJ disability awards in 1963, and only 1.3% in 1964. Own-motion reversals in non-disability cases were considerably more common, largely because the eligibility criteria there were more objective and a "gross error" in deviation from the criteria would be more evident; the disability standards were sufficiently subjective that an award would be upheld, even if the Appeals Council deemed it somewhat erroneous. Memorandum to SSA Commissioner Robert M. Ball from Joseph E. McElvany, Director, Bureau of Hearings and Appeals, November 17, 1964.

[227] As requests for ALJ hearings -- and the accompanying backlogs and delays -- mushroomed in 1975-1980, analysts from OAO, who ordinarily assisted the Appeals Council in its reviews, were dispatched to hearing offices around the country to assist ALJs in conducting hearings and writing opinions. This stopgap measure ameliorated the pressures on ALJs, but it deprived the Appeals Council of the ability to consider own-motion cases. When own-motion review was not reinstated administratively by 1979, the Congress required it in 1980. See 1981 Hearing, supra note 1, at 10.

[228] Social Security Disability Amendments of 1980, Pub. L. No. 96-265, Sec. 304(g). In 1980, Congress was concerned about what it perceived as too-generous application of disability standards, particularly by ALJs. At the instigation of Senator Bellmon, therefore, Congress tightened the rules,

(Footnote continued)

the Appeals Council to take a substantial number of own-motion review cases.

The Appeals Council now receives, for own-motion consideration, a randomly-selected sample of approximately 10-15%[229] of ALJ awards in RSDHI disability cases -- a volume of approximately 300-400 cases per month. The selection of the sample, based solely on claimants' Social Security numbers, is performed by the mailroom clerks in the Office of Disability Operations (ODO) in Baltimore,[230] and files are forwarded to the

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228(continued) enhanced quality control, and instructed the Appeals Council to create a more balanced oversight structure for ALJs by taking cognizance of ALJ awards, as well as of denials.

The statute did not require the Appeals Council to review any particular number of ALJ awards, merely to consider taking them for a review. Thus, a case randomly selected for own-motion review may be disposed of by an OAO analyst acting on his or her own, without forwarding the file to any member, if the case contains no errors. Request-for-review cases, on the other hand, must be seen by at least one member, even if the analyst finds no reason to disturb the ALJ's conclusions.

[229] The Bellmon amendment did not specify a selection routine for own-motion review. SSA selected the figure of 15% for random sampling, and intended to take the review level up to 25% later. The actual percentage of cases taken, however, has generally been somewhat lower: 12.1% (5,736 ALJ allowances) in FY 1986; 14.4% (14,564 cases) in FY 1984. OHA Operational Report, Sept. 30, 1986, p. 8 and OHA Operational Report, Sept. 30, 1984, p. 4. In February, 1987, the figure was further reduced by the Associate Commissioner to 10%, due to Appeals Council workload considerations. SSA has also limited this own-motion review to RSDHI disability cases, since the statute did not require sampling the SSI or concurrent files and there would be practical difficulties in doing so. See infra, note 230.

The random selection for own motion review is done according to the terminal two digits of the claimant's Social Security number. (Since February, 1987, numbers ending in 00-10 have been selected. The selection numbers are changed approximately semi-annually.)

[230] ODO is a large bureaucratic unit, located near the Baltimore SSA headquarters, which serves as a processing center for "effectuating" (i.e., calculating the amount of the award

(Footnote continued)

Appeals Council before the ALJ's award is effectuated.[231] The Appeals Council has 60 days from the date of the ALJ's decision to decide whether to take own-motion review.[232] It is noteworthy that own-motion cases, once a substantial portion of the Appeals Council's docket, have trickled off to very low levels: the Appeals Council took review of only 59 such cases in May 1987, and reversed only 23 of those.[233]

One special kind of Bellmon review that proved particularly controversial during its pendancy was "targeted" review, in which individual ALJs were selected, based upon their unusually high award rates or unusually low productivity, for Appeals Council scrutiny.[234] This targeting was seen by many as an assault upon

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230(continued)
and issuing the checks) in RSDHI disability cases in which the claimant is age 58 or younger. (This accounts for 80% of all RSDHI disability claims.)

SSI disability cases are effectuated through one of the SSA's district offices around the country. Concurrent RSDHI/SSI cases are bifurcated, with ODO managing the Title II component and another unit managing the Title XVI component. Since the case file is segregated in this way, it would be physically difficult to deliver a sampling of concurrent case files to the Appeals Council for own-motion review. Own-motion review, therefore, is now confined to RSDHI disability files.

[231] The ALJ's "Notice of Favorable Decision" advises a claimant that the Appeals Council may take own-motion review of the case. A claimant is not notified when his or her case has been selected for inclusion in the sample of cases forwarded to the Appeals Council by ODO. The claimant is notified, as described below, if the Appeals Council elects to grant review of the case.

[232] 20 C.F.R. §§404.969, 416.1469 (1986). If the Appeals Council does not take own-motion review of the case, it is returned to ODO for effectuation. This detour may delay a case for 3-5 weeks. When the case is returned to ODO, its effectuation is expedited so that payment to the claimant is delayed as little as possible.

[233] OHA Key Workload Indicators, p. 10 (May, 1987). For the first eight months of FY 1987 cumulatively, the Appeals Council took 619 own-motion cases, reversing 258, remanding 255, affirming 80, and taking other action in 26. Id.

[234] The 1980 amendments did not specify the strategies for
(Footnote continued)

the judicial independence of the ALJs, and an attempt to pressure

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234(continued)
selecting cases for own-motion review; SSA developed the two techniques (targeting a number of individual ALJs or offices, and random sampling of other awards), and implemented them through Program Policy Statements, which were not published as notice-and-comment rulemaking.

The targeting program proceeded despite internal SSA studies that failed to demonstrate a conclusive statistical correlation between ALJs who had high allowance rates and ALJs who made frequent errors. Cofer, supra note 1, at 118-20.

The initial Bellmon review implementation plans called for review of all allowances by any ALJ who granted benefits 70% of the time or more. Entire hearing offices with allowance rates of 74% or more would also be fully reviewed.

Later ALJs were targeted according to the frequency with which the Appeals Council granted own-motion review of their cases; a targeted ALJ could be reviewed 100%, 75%, 50% or 25% of the time. An ALJ could be removed from the target list when only 5% of his or her cases resulted in a grant of review by the Appeals Council. See 1983 Hearing, Testimony of Associate Commissioner Louis Hays, supra note 1, at 14-42.

The operation of the Bellmon review program was contested in Ass'n of Administrative Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984), in which District Court Judge Joyce Hens Green held that the program "was of dubious legality" and tended to produce improper pressure to issue fewer allowance decisions, but that the plaintiff organization was not entitled to relief in light of defendant's later modification of the program and an absence of specific harm suffered.

On June 21, 1984, the Associate Commissioner for OHA discontinued the targeted ALJ portion (by then, referred to as the "selected ALJ" portion) of Bellmon review, stating that the program had achieved its objective of narrowing the difference in own-motion rates (the frequency with which the Appeals Council acted to correct an ALJ decision) between the targeted judges and the national random sample. Memorandum from Frank V. Smith III, to All Administrative Law Judges, June 21, 1984.

In 1987, the 9th Circuit determined that the standards for

(Footnote continued)

them into denying more claims.[235] After 1984, the targeting aspect of own-motion review was eliminated.[236]

A third category of own-motion review is similar to targeted review, but serves a less controversial quality control or training function. Under it, most or all decisions by a new ALJ, during his or her first six months of hearing cases, are presented to the Appeals Council for monitoring consistency with SSA rules and procedures.[237]

Another kind of own-motion review involves "protests": assertions by ODO or another processing center that a particular ALJ award decision could not lawfully be implemented because of some technical error (e.g., lack of RSDHI coverage, failure to incorporate the five-month waiting period). In addition to these relatively rare minor oversights, ODO and other SSA components have increased the number of "substantive" protest cases -- where the ALJ's award is challenged as factually or legally incorrect -- and the "protest" caseload now runs approximately 100-150 per month.[238]

234(continued) conducting targeted review were substantive rules (not merely interpretive statements, as SSA had argued) and were therefore invalid for failure to comply with APA procedures. Reinstatement of benefits was therefore ordered for claimants who lost when a targeted ALJ's award was reversed by the Appeals Council. W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987).

[235] The Appeals Council was not involved in the selection of ALJs to target. The Deputy Chair deliberately recused himself from those deliberations, to avoid a situation in which the Appeals Council would help single out ALJs for review and would then conduct the review itself. Comments by Burton Berkley, Deputy Chair of Appeals Council, Cleveland transcript, supra note 1, at 269.

[236] For many people, the targeting program was synonymous with the phrase "Bellmon review," but SSA considers both targeted and randomly-selected own-motion review to be "Bellmon review." Appeals Council forms today continue to label as "Bellmon" cases all files randomly selected for non-targeted own-motion review.

[237] This category of own-motion review long pre-dates the Bellmon Amendment. The Chief ALJ may prolong or shorten the 6-month period.

[238] ODO and other SSA components detect errors of three basic
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238(continued)
types. In one, newly-received evidence that was not available to the prior decisionmaker (ALJ or Appeals Council) may suggest that the prior decision should be reviewed. (For example, a new W-2 form may indicate that the claimant has recently performed substantial gainful activity that the ALJ was unaware of.)

The second type of correction occurs when the ODO or processing center's claims authorizer (an expert in the non-medical aspects of disability cases, graded as GS-10) begins the process of calculating the exact sum of benefits due under an ALJ award. At this point, the claims authorizer picks key dates (onset of disability, application, expiration of insured status, etc.) from the ALJ's decision, and may detect inconsistencies, omissions or simple typographical errors. If this error is confirmed by a GS-11 supervisor (a technical assistant) a 1-2 page protest memorandum will be prepared, and forwarded with the file to the Appeals Council.

The third type of error is uncovered when the claims authorizer suspects there may be a defect in the ALJ's medical assessment. (A "reject criteria list" identifies types of cases were errors are more likely.) The file is forwarded to a disability examiner (GS-11) or a disability specialist (GS-12) who may identify unexplained anomolies in the ALJ's consideration of the medical record. If so, a protest memorandum is prepared, bringing the issue to the attention of the Appeals Council.

ODO prepares approximately 40 such protest memoranda per month, about half based on financial issues and half on medical criteria. Other effectuating components also identify similar types of errors, and it appears that an increasing number of these are "substantive" (focusing on the medical aspects of the disability) rather than purely "technical." Standard procedures call for all these matters to be directed to the Appeals Council for correction. Occasionally, however, when the error appears to be simply typographical, the claims authorizer may telephone the ALJ to suggest re-issuance of a corrected decision.

If the protest concerns only the onset date and the size of the claimant's initial lump-sum payment, the effectuating components will begin payment of the current monthly benefits portion of the ALJ's award, and notify the claimant that the retroactive amount is being reviewed. Similarly,

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A final category of cases that used to come occasionally before the own-motion review function of Appeals Council arose from the Government Representation Project (GRP). In this program, in effect from 1983 to 1986, several local hearing offices experimented with having a governmental attorney develop a case as an adversary to the claimant, argue at the hearing, and cross-examine the claimant's witnesses.[239] The government representatives could not formally "appeal" a case past the ALJ stage, but did have authority to "suggest" when a particular award decision ought to come to the attention of the Appeals Council.[240]

b. Types of Actions. When a case comes to the Appeals Council for review-level work, whether on a claimant's request for review or on the Appeals Council's own motion, there are then three options: dismiss the case, deny review or grant review.[241]

The Appeals Council will dismiss a case if the request for review is not timely filed and no extension has been granted, or if the claimant requests dismissal.[242] The Appeals Council will

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238(continued)
in an "old" case (i.e., when ODO's workload prevents it from delivering a protest to the Appeals Council within 45 days of the ALJ's decision), partial effectuation will begin.

Almost all of ODO's protests are accepted by the Appeals Council, and result in taking own-motion review (or in a reopening) to undo the error.

ODO also plays a similar role in reviewing and protesting Appeals Council awards. Errors at this stage are less frequent, generating perhaps 20 protests per year.

[239] 20 C.F.R. §§404.965, 416.1465 (1986). See sources, supra note 128.

[240] The government representative would transmit to OAO the file, together with a detailed memorandum explaining why the Appeals Council ought to consider the case. Although the Appeals Council was not required to accept the government representative's suggestion, it did in fact frequently take own-motion review in that situation.

[241] 20 C.F.R. §§404.967, 416.1467 (1986). Technically, the term "grant review" is overly broad here: The Appeals Council does "grant" a claimant's request for review, but it "takes" review of Bellmon cases on its own motion. For convenience, the former verb is generally used in this section to refer to both types of actions.

deny review if it determines that the ALJ's decision and order are correct and should not be altered. It will grant review when there is a defect or potential defect in the ALJ's work.

In FY 1986, the Appeals Council disposed of 44,621 cases, of which it dismissed 5,273 (11.8%); denied review in 28,906 (64.8%); and granted review in 10,442 (23.4%).[243]

When review is granted, the Appeals Council may notify the claimant about the issues to be considered.[244]

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[242] 20 C.F.R. §§404.971, 416.1471 (1986). A claimant may request dismissal of the appeal if he or she has second thoughts about the strategic desirability of appealing the adverse portions of a partially-favorable ALJ decision, at the risk of having the Appeals Council reverse the favorable portions.

One court has ruled that where a claimant requests review of a partially-favorable ALJ decision, the Appeals Council may not disturb the favorable portions, unless it has taken own-motion review of the case within the 60-day period. Powell v. Heckler, 783 F.2d 396 (3d Cir. 1986), amended opinion, 789 F.2d 176 (1986); contra Delong v. Heckler, 771 F.2d 266 (7th Cir. 1985).

[243] See Chart 5 and OHA Operational Report, Sept. 30, 1986, p. 27. In FY 1985, the Appeals Council disposed of 71,166 cases, dismissing 7662 (10.8%), denying review in 53,624 (75.4%) and granting review in 9880 (13.9%). Id. The grant review rate and the dismisal rate for these years are unusually high, because Pub. L. No. 98-460 required returning thousands of mental impairment cases to the DDSs at that time for further evaluation under new standards. Many other remands were required in CDR cases, for evaluation under a medical improvement standard.

[244] 20 C.F.R. §§404.973, 416.1473 (1986). In a request-for-review case, the claimant is not notified that the Appeals Council has decided to grant review; the first reply the claimant receives is the notification of the Appeals Council's decision to reverse, remand, modify or affirm.

In an own-motion situation, the claimant is similarly not notified about the Appeals Council decision whether to review the case: if review is denied, the file is forwarded for effectuation, and the claimant may never realize that his or her case had been considered for review. If the Appeals Council takes review, and decides to remand the case to the ALJ, the claimant's first notification will be a copy

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The Appeals Council then has four further options: reverse, remand, modify or affirm.

A reversal is a flat change in the ALJ's decision: either changing a denial to an award (in a request-for-review case) or changing an award to a denial (pursuant to own-motion review). It is typically used when the ALJ has done an adequate job in developing the factual record (so no further evidence-taking is necessary) but has stated or applied the law incorrectly, in a fashion the Appeals Council can remedy itself.

A remand sends the case back to the ALJ,[245] for an entirely

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244(continued) of the remand order. If the Appeals Council takes review with the intention of modifying or reversing a favorable ALJ decision, it mails to the claimant a notice of its proposed disposition, and affords the claimant 20 days to comment. Thereafter, the claimant receives a copy of the Appeals Council's final decision.

[245] There are three main options regarding a standard practice for remanding cases from the Appeals Council to an ALJ. One would be for remands generally to go back to the same ALJ who heard the case initially (on the principle of judicial economy, since an ALJ already familiar with the case may require less time to correct it, and also on the principle that the ALJ who made the error should have the responsibility for -- and can directly learn by -- cleaning up the mistake.) A second option would adopt the general practice of deliberately sending a remand to a different ALJ (on the principle that the original ALJ may have a fixed idea about the case and be less able to re-examine it afresh.) Finally, remand cases could be assigned simply by rotation among the ALJs in the local office, as initial case assignments are, without regard to whether a particular ALJ had previously been involved.

SSA's practice has varied among these options. Before 1979, Appeals Council remands generally were returned to the originating ALJ. After the settlement in Bono v. SSA (case in US district court for the Western District of Missouri, alleging unfair OHA pressures on ALJs, settled June 7, 1979), remand assignments were generally doled out by rotation among ALJs in the particular local office. In the majority of instances, this meant that the remanded hearing was conducted by a different ALJ. Statement by then SSA Chief ALJ Paul Rosenthal, 8 Social Security Forum No. 5, p. 4 (May 1987).

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new hearing, for the collection of additional evidence, for the re-writing of an opinion,[246] or the like.[247]

245(continued)

Most recently, SSA has returned to the general practice of assigning a remand case to the same ALJ who issued the original decision, unless a) there has been an allegation of unfairness at the first hearing, b) the Appeals Council has special reason to specify that a new ALJ should be used or c) administrative factors in the local office make it much more convenient or efficient to designate a new ALJ. Memorandum from Acting Chief ALJ James R. Rucker, Jr., to Executive Staff, June 23, 1987.

[246] Recently the Appeals Council has departed from its prior "harmless error" policy by granting review over more ALJ decisions in which the correct outcome was reached, but the hearing process or the written opinion was flawed. The Appeals Council then re-writes the decision itself or remands to the originating ALJ with instructions, not necessarily to change the result, but to write a better opinion. A better ALJ opinion -- longer, more detailed, more expository of the facts and the law -- it is reasoned, will be both more informative to the claimant and more defensible in court. Memorandum from Frank V. Smith, III, Associate Commissioner of Office of Hearings and Appeals on "Circuit Court Case Study -- Action" June 17, 1986 (advising ALJs and Appeals Council members on the results of a study of 800 circuit court decisions, reflecting judicial policies and preferences); OHA Operational Report, Sept. 30, 1986, p. 6.

In some instances, the Appeals Council has effectively re-written the ALJ decision itself, bolstering the expressed rationale for a denial and putting the strongest face on a case that may go to court. Memorandum from Edwin Semans, Jr., Director of OAO, Jan. 30, 1986, 8 Social Security Forum No. 2, p. 1 (Feb. 1986); Social Security Ruling 82-13 (1982); Edwin Semans, Jr., "Note to Executive Secretariat," Dec. 30, 1986 (Appeals Council frequently remands cases to ALJs to correct errors, even when ultimate decision to deny benefits is not disturbed; Appeals Council also frequently re-writes decision itself.) In general, the current practice is for the Appeals Council to write the new decision itself, unless additional facts are needed or a critical finding is required from the ALJ.

[247] An ALJ may protest a remand decision, complaining to the Appeals Council (or to the Associate Commissioner for OHA)

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The Appeals Council may also modify an ALJ order, altering part of the decision or opinion, without a remand.

An affirmance of the ALJ decision leaves it intact. Affirmance is a reflection that the concerns which caused the Appeals Council to decide to grant review in the first place have now been satisfied, and no correction is necessary.

In FY 1986, the Appeals Council granted review in 10,442 cases. It reversed the ALJ in 2434 (23.3%); remanded 6782 (65%); and affirmed 1226 (11.7%). When compared to the overall caseload of the Appeals Council (44,621 cases in FY 1986) instead of only to those 10,442 cases in which the Appeals Council granted review, the reversals were 5.5% of the total cases, remands were 15.2% and affirmances were 2.5%.[248]

c. Standard of Review. Until 1976, the Appeals Council

247(continued) that the remand is unnecessary, its terms are unclear, etc. If this protest is initially made informally or orally (e.g., in a telephone call), the Appeals Council practice is to suggest that the ALJ file a motion for clarification of the remand order, with a copy to the claimant. The issue may then be dealt with on the record, rather than *ex parte*. ALJs rarely proceed with this formal process.

[248] OHA Operational Report, Sept. 30, 1986, p. 27. These figures do not separately identify cases in which the Appeals Council modified the ALJ's decision -- those are included as either affirmances or reversals, depending upon the Appeals Council's ultimate resolution of the case.

The FY 1986 figures are unusual in the high number of remands, due to statutory intervention requiring remands of large numbers of mental impairment cases. The remand rate (as a fraction of overall Appeals Council cases) was 8.3% in FY 1985, 7.3% in FY 1984, 5.6% in FY 1983, 7.7% in FY 1982, and 7.9% in FY 1980. The reversal rate was 4.3% in FY 1985, 5.3% in FY 1984, 5.1% in FY 1983, 4.4% in FY 1982, and 4.9% in FY 1980. *Id*.

Going back further, statistics reflect action by the Appeals Council favorable to the claimant in 3.6% of its decisions in 1960; 9.6% in FY 1965, and 12.4% in FY 1970. (At least three-quarters of these cases were disability appeals.) Department of Health, Education, and Welfare, Briefing Pamphlet for the Bureau of Hearings and Appeals, p. 21 (June 30, 1971).

conducted essentially a de novo review of the ALJ's work.[249] Internal modifications then led to transforming the Appeals Council into somewhat more of a true appellate body, and regulations today specify five grounds upon which the Appeals Council will grant review of a case:

> (1) There appears to be an abuse of discretion by the administrative law judge;
> (2) There is an error of law;
> (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence;[250]

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[249] The departure from *de novo* review in RSDHI disability cases was made pursuant *to regulation* published at 41 Fed. Reg. 51588 (Nov. 23, 1976). The SSI disability program had never been the subject of *de novo* review at the Appeals Council level. 39 Fed. Reg. 37977 (Oct. 25, 1974).

The 1976 change was instigated by the attempt to reduce the workload of the Appeals Council, in order to free up personnel (OAO analysts and others) who could be detailed to various local hearing offices to assist ALJs in dealing with their backlog of cases.)

[250] The substantial evidence test is also employed upon review in federal court, but there has been a controversy over whether the district judge is to investigate the existence of substantial evidence to support the decision of: (a) the Appeals Council or (b) the ALJ. Where the Appeals Council reverses the ALJ on a close-to-the-borderline case, there may be substantial evidence to sustain either a denial or an award. *See Parris v. Heckler*, 733 F.2d 324 (4th Cir. 1984) (inquiry is whether decision of Appeals Council, not decision of ALJ, is supported by substantial evidence); *Parker v. Heckler*, 763 F.2d 1363 (11th Cir. 1985), *reh'g granted and opinion vacated*, 774 F.2d 428 (11th Cir. 1985), *en banc decision issued sub. nom. Parker v. Bowen*, 788 F.2d 1512 (1986) (same); *Mullen v. Bowen*, 800 F.2d 535 (6th Cir. 1986) (same); *Fierro v. Bowen*, 798 F.2d 1351 (10th Cir. 1986) (same); *Bauzo v. Bowen*, 803 F.2d 917 (7th Cir. 1986) (same). The ALJ's findings of fact, of course, remain highly relevant to the court's scrutiny of the "substantial evidence" supporting the decision of the Appeals Council.

In practice, however, reviewing courts typically devote the vast bulk of their attention to a review of the ALJ's decision and the evidence adduced in connection with the hearing; the work of the Appeals Council, which constitutes the final action of the Secretary, usually receives far less

(Footnote continued)

(4) There is a broad policy or procedural issue that may affect the general public interest;[251] or

(5) There is new and material evidence submitted.[252]

The Appeals Council does not maintain statistics on the relative frequency of use of these five bases for review, but the general impression is that assertions of "lack of substantial evidence to support the ALJ's decision," and "presentation of new and material evidence" are the most frequently utilized.[253]

There has been controversy about the degree to which the Appeals Council is constrained by this list in the regulations: are these five the only bases upon which the Appeals Council may grant review, or is the list simply illustrative, with the Appeals Council also free to review cases for other, unstated reasons? To date, circuits have generally granted the Appeals Council the broader power to take cases for diverse reasons, not confining it to the published list.[254]

d. New Evidence. Appeals Council receipt of additional evidence, whether provided before or after the decision to grant review of the case, has been problematic.[255]

250(continued) scrutiny.

[251] 20 C.F.R. §§404.970(a), 416.1470(a) (1986). The categories are elaborated in OHA Handbook, supra note 182, at 5-40.

[252] 20 C.F.R. §§404.970(b), 416.1470(b) (1986). To qualify as "material" under current Appeals Council procedures, the evidence must relate to the period of time covered by the ALJ's decision.

[253] Claimants also frequently allege an unfairness at the hearing, citing the ALJ's behavior or apparent attitude. Unfairness may be evidenced on the hearing record, or it may require additional investigation. OHA Handbook, supra note 182, at 5-40-21.

[254] Bauzo v. Bowen, 803 F.2d 917 (7th Cir., 1986); Razey v. Heckler, 785 F.2d 1426 (9th Cir. 1986); Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986).

[255] 20 C.F.R. §§404.976, 416.1476 (1986).

Receipt of new evidence was anticipated to be a "puzzling problem" as early as 1940, and regarding even the hearing stage (not only the appeals stage) of the claims process.

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New evidence may be generated in a variety of circumstances: a) a claimant who appeared pro se before the ALJ finally secures representation at the Appeals Council stage, and the new representative discovers or develops additional evidence that was missed at the ALJ stage; b) in the interval between the ALJ hearing and the Appeals Council review, the claimant, especially one with an ongoing or deteriorating condition, secures a more recent medical review or treatment, which also has a bearing upon assessment of the impairment for the time period considered by the ALJ; or c) the providers of medical services are simply tardy in response to ALJ or DDS requests for copies of needed medical records.[256]

As a formal matter, the administrative evidentiary record in a disability case is closed after the ALJ's decision.[257] This rule was emplaced by statute in 1980 for RSDHI cases[258] and by regulation in 1986 for SSI and concurrent claims.[259] This means

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255(continued)
Attorney General's Committee on Administrative Procedures, Monograph No. 16, "Social Security Board", Apr. 1940, p. 41.

[256] There is also a suspicion that some unethical attorneys may deliberately withhold important evidence during the DDS and ALJ phases, and present it for the first time to the Appeals Council or in federal court. If this evidence makes the difference between denying and awarding benefits, then its late submission means that the favorable decision will be delayed. This delay has the effect of substantially increasing the claimant's eventual lump-sum of retroactive benefits, and the attorney's fees are typically calculated as 25% of this past-due amount. There are no data about the existence or frequency of this practice, and it would appear foolish (as well as unethical) for an attorney to risk losing any fee by withholding evidence from the ALJ (where the probability of an award is greatest) in the hope of increasing the fee by winning a later victory before a subsequent adjudicator. Nevertheless, many SSA officials believe the practice exists.

[257] The ALJ may close the record at the conclusion of the hearing or may keep it open for a specified period of time to receive a claimant's brief, late documents, or the results of a post-hearing consultative examination.

[258] 42 U.S.C. §402(j)(2) (1982), Pub. L. No. 96-265, §306.

[259] 52 Fed. Reg. 4001 (Feb. 9, 1987), codified at 20 C.F.R. §§404.970, 976, 416.1470, 1476 (1987) (effective with

(Footnote continued)

that the Appeals Council will consider evidence that was not presented to the ALJ only if the evidence is new and material and relates to the period of time which the ALJ considered. If the new evidence pertains solely to a condition that has arisen or worsened since the ALJ hearing,[260] the Appeals Council will not evaluate it, but will return it to the claimant with a suggestion that the documents may be relevant to a new application for benefits, should the pending one be denied.[261]

259(continued)
applications filed after May, 1986).

[260] As a practical matter, it is often very difficult to determine whether proffered new evidence relates only to the period after the ALJ's decision, or whether it also supports inferences about the claimant's condition during the pendency of the current application. The Appeals Council considers itself to be relatively expansive in its willingness to receive new evidence, having concluded that if it refuses to accept the new evidence, and the claimant then files a civil action, the federal court is likely to look more sympathetically on the new evidence and will order a remand for its receipt. See Weinstein, supra note 82, at 917 ("When the new evidence is highly persuasive, the good cause standard [for a remand from the district court to the Appeals Council] is apt to prove highly malleable."); OHA Handbook, supra note 182, at 5-38-18B. Many claimants representatives, however, report that the Appeals Council has not been especially liberal in considering new evidence, and that recourse to the courts is frequently required.

[261] A new application for benefits may be filed even before the old one is finally adjudicated. To the extent that the two relate to the same time period, however, denial of the first claim will be conclusory unless it is reopened, and SSA is generally reluctant to reopen old claims.

A second application that relates to a different time period may be pursued at any time. (For example, an SSI claimant may file an application in 1984 and appeal its denial while simultaneously filing a new application in 1986. In effect the claimant is thereby arguing in the alternative: my onset date of disability was in 1984 and, if SSA does not accept that, my condition further deteriorated so that by 1986 it became disabling.) However, if the new claim is allowed (by a DDS or ALJ) while the old claim is pending in court, there may arise a confusing contradiction within SSA about the onset date of disability.

SSA procedures are supposed to identify promptly these

(Footnote continued)

e. Reopening ALJ Decisions. Related to the issue of receipt of new evidence is the controversy over the "reopening" of cases. Regulations provide a series of circumstances for reopening and revising prior disability decisions and determinations: a) within 12 months, for any reason; b) within four years, for good cause (e.g., new evidence, discovery of a clerical error) or c) at any time, for a variety of reasons including fraud, gross error, etc.[262]

The Appeals Council has frequently exercised the reopening power in "protest" situations -- where the case was not selected for own-motion review and the 60-day own-motion period has expired, but the processing center, in effectuating the ALJ's award, discovers some technical defect inhibiting payment. The case is then returned to the Appeals Council for reopening to correct the error.[263]

261(continued)
situations in which two contemporaneous applications are being evaluated at different tiers of review, but they are not always successful.

It should also be noted that filing a second application, after the first has been denied, is no panacea. An SSI claimant who pursues this course would lose a substantial retroactive award, for the period of months covered by the first application but prior to the second. An RSDHI disability claimant could be even more disadvantaged; if his or her insurance coverage lapses during the interval, the second (and all subsequent) applications will be denied on the basis of financial ineligibility, regardless of any deterioration in medical condition.

[262] 20 C.F.R. §§404.987-96, 416.1487-94 (1986). Reopening an SSI case "for good cause" is limited to the first two years after the decision, instead of four years as in RSDHI disability cases. 20 C.F.R. §416.1488(b) (1986).

[263] This reopening could be beneficial or detrimental to the claimant. If the ALJ's award decision overlooked a technical requirement (e.g., onset date before the expiration of insured status), correction of it could increase or decrease the size of the award. (Sometimes mere typographical errors may be corrected via a telephone call from the OAO analyst to the ALJ, who issues a corrected decision. OHA Handbook, supra note 182, at 5-42.)

One example is where an ALJ, in awarding substantial retroactive RSDHI disability benefits, omits the technical
(Footnote continued)

More controversially, the Appeals Council has also come to rely upon the reopening provisions to consider a case that would have been selected for conventional own-motion review, but the bureaucracy has moved so slowly that the 60-day own-motion period has already elapsed. In this context, the reopening provisions greatly enlarge the Appeals Council's opportunity to reverse an ALJ's award and delay the finality of the administrative process.[264]

In response to claimants' complaints about this expansive application of the reopening power, one circuit court has held that the first category of grounds for reopening (reopening for any reason, within 12 months of the prior determination) may be exercised only by a claimant, not by the Appeals Council.[265] Another circuit court has authorized governmental use of this grounds for reopening, but only by the particular decisionmaker who had originally issued the decision to be reopened (so only the ALJ, not the Appeals Council, could reopen an ALJ's award.)[266]

f. Timing. The amount of time required for Appeals Council case handling at the review level varies enormously, depending upon the type of action taken and the size of the Appeals Council's contemporary workload. Numerous complaints about very old cases languishing for months have led to proposals to restrict the time available for the Appeals Council to 60 or 90 days.[267]

263(continued)
step of reopening and redetermining the claimant's prior adverse, but unappealed, decision on a previous application. Until it is reopened, the prior decision may stand as a res judicata bar to payment of benefits for the period of time it covers. The SSA program service center might discover this problem in effectuating the ALJ's award, and forward the file to the Appeals Council for resolution.

[264] Wilson, "Procedural Challenges to Social Security Appeals Council Practices," 20 Clearinghouse Rev. 8, 937-42 (Dec. 1986); Buckel, "Reopening a 'Final' Social Security Decision: Must There Be New Evidence?" Cornell Law School Social Security Seminar, (Dec. 19, 1986).

[265] McCuin v. Bowen, 817 F.2d 161 (1st Cir. 1987); Contra Munsinger v. Schweiker, 709 F.2d 1212 (8th Cir. 1983); see also Chrupcala v. Heckler, No. 86-1469 (3d Cir. Sept. 28, 1987).

[266] Butterworth v. Bowen, 796 F.2d 1379 (11th Cir. 1986).

[267] 1986 Hearing, supra note 1, at 77 (testimony of Associate
(Footnote continued)

The Appeals Council has adopted a series of internal goals for processing time, and it regularly monitors analysts' and members' conformity to these standards.[268] In 1985, average

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267(continued)
Commissioner Frank Smith.)

Most of the horror stories about very old cases are attributable to "lost" files: situations where the request for review is never properly associated with a claims folder, where the file is mistakenly mailed away, or where the file is simply forgotten in a storage area. Some delays are also due to the complexity of a particular case or to a legitimate need to obtain additional evidence. Lost files should become somewhat less common as the Appeals Council gains experience with its new computer case management system, but even this system (which OAO does not share) may prove inadequate to the task of monitoring so many cases.

At least some of the ire over Appeals Council delays may be traced to the fact that a typical disability claimant has already endured a very lengthy SSA process prior to requesting Appeals Council review (or having the Appeals Council take the case on its own motion). The glacial pace of SSA case handling in general frequently results in over a year's lag between the initial application and its presentation to the Appeals Council. Further tardiness at this stage merely compounds one of the aspects of the SSA claims system that claimants find most aggravating.

[268] The internal Appeals Council and OHA processing time goals and performances are as follows:

a) On request-for-review cases, the goal is to dispose of all cases within 90 days, measured from the filing of a request for review until the Appeals Council issues its decision. As of May, 1987, the average was actually 96 days, of which 90 days was attributable to OAO and 6 days to the Appeals Council.

b) If a request-for-review case comes into the Appeals Council from OAO within 85 days, the members are supposed to dispose of it before the 90th day; they are rated for merit pay purposes on their ability to do so.

c) "Aged" cases (over 150 days) are flagged for special handling, and members are supposed to dispose of them first, within 7 days of receipt.

(Footnote continued)

processing time in request-for-review cases was 116 days;[269] it had decreased to 96 days by May, 1987.[270]

g. Progression of a Typical Case. Although the "review level" cases vary substantially in their content and procedures, a more-or-less standardized routine has developed for processing a "typical" case. This part therefore describes the Appeals Council's mechanism for handling the usual files.

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268 (continued)

d) In an own-motion case, the Appeals Council is supposed to decide, before the 60-day Bellmon period expires, whether to grant review. This deadline is almost always met; if not, the "reopening" provisions have been exercised. Effective July 2, 1987, the Appeals Council has determined that the reopening regulations will not be used to take jurisdiction over an old Bellmon case. After the decision to grant review, the Appeals Council may take an additional 90 days to decide how to dispose of the case.

e) In court cases, an answer (together with transcript) is to be filed within 60 days of service of the complaint. Several years ago, this deadline was met less than 20% of the time; now it is satisfied 95% of the time.

f) When a case is remanded from a court, OHA's goal is a processing time of 42 days before the case is remanded back to the ALJ. The current performance average is approximately 30 days.

g) The goal for Appeals Council action on an ALJ's recommended decision in a court remand case (See infra, text at note 308) is 45 days. The current performance is 84-90 days, of which 10 1/2 days are consumed by the Appeals Council and the rest by OAO or the claimant.

h) Every case, regardless of other considerations, is to be resolved within 60 days of arrival at the Appeals Council.

[269] 1986 Hearing, supra note 1, at 77. Among the factors cited in explanation for these long delays were heavy demands upon Appeals Council and OAO in response to class action litigation; delays while awaiting pending new regulations on mental impairments and medical improvement; and diversions of staff to service court cases more rapidly.

[270] OHA Key Workload Indicators, May 1987, p. 13. In own-motion cases, the average processing times are 138 days in OAO and 4 days in the Appeals Council, for a total of 142 days. Id.

When a case is delivered to the Appeals Council -- either on the claimant's request for review or through random or protest selection for possible own-motion review -- the file is routed to the geographically appropriate division and branch of the Office of Appeals Operations. There it is randomly assigned to an analyst, who is instructed to complete work on it within 10 days.

The analyst reviews the entire file, including the ALJ's decision. A tape recording of the hearing is included with the file, and the analyst listens to, and takes written notes about, all or part of the tape in perhaps 15-20% of the cases. (The analyst is required to listen to the tape if (a) he or she recommends taking own-motion review, (b) there is an allegation of an unfair hearing, or (c) there has been testimony by a medical or vocational expert.)[271]

The analyst then prepares a report summarizing the file, highlighting key issues, and recommending a course of action for the Appeals Council. The primary vehicle for this reporting in request-for-review cases is a three-page "face sheet," a form on which the analyst checks appropriate boxes and fills in blanks to reflect the salient characteristics of the claim and the ALJ's handling of it.[272] The analyst may also choose to write a one- or two-page narrative statement describing the case further and justifying a recommendation in greater detail.[273] The analyst then drafts a proposed decision and appropriate notification letters to the claimant. Typically, an analyst might spend a total of three or four hours working on a case file, although there is wide variation among analysts and among cases.[274]

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[271] In a request-for-review case, the analyst must listen to the testimony of the medical advisor or vocational expert in order to determine whether the ALJ's decision to deny benefits was based on substantial evidence. The analyst ordinarily does not replay the claimant's testimony (the Appeals Council is unlikely to reverse an ALJ's decision not to credit the claimant's testimony) but does need to double-check the sufficiency of the record supporting denial.

In some instances, however, SSA has discovered -- once the case has gone to court -- that the hearing tape is inaudible and no transcript can be prepared. There may be benign explanations for this (e.g., the quality of the tape degraded in improper storage after the analyst heard it; the segment containing the expert's testimony was audible, but the rest was not; this was not a type of case in which the analyst was required by existing standards to listen to the tape prior to writing a proposed decision) but sometimes it means simply that the analyst has not listened to the tape as required, and the member has not detected the omission.

[272] The face sheet asks, inter alia, which ALJ handled the case, whether the claimant is represented by counsel, what the basis was for any unfavorable aspect of the decision, whether the ALJ correctly assessed the claimant's residual functional capacity and other vocational issues, and what (Footnote continued)

Essentially the same procedure is utilized for own-motion cases, except that where the analyst determines that own-motion

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272(continued)
legal basis the analyst identifies to support the recommendation.

The face sheet does not call for a narrative reciting the facts of the case or the arguments of counsel; these are available in the ALJ's decision document or in a brief.

Some claimants' representatives have begun requesting, as a routine matter, a copy of the analyst's work under the Freedom of Information Act and the Privacy Act. The current SSA policy is that the analyst's notes -- as well as the notes that may be exchanged between members of the Appeals Council in reviewing a file -- are to be released to the claimant upon request. (For several months during 1986, this policy was under review, and requests were handled on a case-by-case basis, with some unevenness in outcome.)

[273] Analysts do not have much time for writing the narratives, and analysts are evaluated by OAO more on the volume, rather than on the quality, of the work they do. Members of the Appeals Council, on the other hand, frequently appreciate the fuller insights contained in the written statement, rather simply the multiple-choice form. An analyst may thus experience some conflict in attempting to serve two masters: the analyst is simultaneously an assistent to a member of the Appeals Council and a staff member of the OAO branch.

[274] Some analysts regularly complete twice or three times as many cases per month as others. Cases in which the analyst intends to recommend a grant of review usually take appreciably longer (they much more often, for example, require the analyst to write a substantial narrative) than cases where review should be denied. One analyst estimated that in a typical request for review case, processing a standard denial might take an analyst 30-45 minutes. On the other hand, making a recommendation for granting review (or for denying review where new evidence had been submitted after the ALJ's decision and the Appeals Council would have to respond to it) might take two or three hours.

review should not be taken, the face sheet is shorter (one page) and more conclusory.[275] If the analyst concludes that own-motion review is inappropriate, the case is finished: these files are not reviewed by any Appeals Council member, but are promptly forwarded for effectuation of the ALJ's award.

From OAO, the file is delivered to a member of the Appeals Council.[276] If the analyst has recommended denying review, then only one member will be assigned to the case.[277] If that member concurs in a denial, that is the end of the case: the file is returned to staff to mail the denial notice to the claimant. The file is then held in the originating OAO branch for 120 days, in case the claimant files a federal court complaint, which will require further monitoring. If there is no civil action, the file is ultimately deposited for long-term storage at a federal records center.

If the analyst has recommended granting review, and the member agrees, (or if the analyst has recommended denying review but the member disagrees) the case will be seen by two members.[278]

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[275] The own-motion face sheet or "effectuation sheet" omits all the demographic data of the longer form, and essentially asks the analyst only to check the correctness of the ALJ's conclusions. If the analyst decides that own-motion review should be taken, a more detailed form is used.

[276] The Appeals Council has recently procured a modest data processing capability, based on Wang computers. This system is designed to track case files, assess timeliness and monitor bottlenecks. OHA Operational Report, Sept. 30, 1986, p. 14-15. In our observation, the system was a substantial step forward, but far from adequate to meet the needs. See infra, section IV.E.3.f.

[277] 20 C.F.R. §422.205(c) (1986). See Chart 6A.

[278] 20 C.F.R. §422.205(b) (1986). The principle is that it is the members, not the analysts, who decide whether to review a case, so regardless of the analyst's recommendation, it is up to the first member to determine whether the case ought to be seen by a second member. (The exception to this principle is in own-motion cases: There, if the analyst recommends taking review, the case will be seen by two members, even if the first member disagrees with the analyst's recommendation.)

The method for assigning the two members to a case has become very complex. It used to be done in a fashion that permitted the "A" member to "shop around" for a "B" member,

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The first (designated the "A" member) reviews the file and sends it along with a note about the proposed outcome.[279] The secondary (or "B") member conducts a similar evaluation. If the "A" and "B" members agree, their decision is final. Notices are mailed to the claimant and the decision is implemented.

If the "A" and "B" members do not initially agree on an outcome, they meet to discuss the case.[280] If the disagreement persists, the Deputy Chair of the Appeals Council (or a designee) serves as a "C" member, reads the file, and resolves the

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278(continued) and try to select one who might be inclined to take a position similar to that favored by the "A" member. The old system also afforded discretion to office staff in allocating case loads.

Now the selection is done numerically by the claimant's Social Security number. The "A" member is designated from within the appropriate geographic grouping, based on an even division of numbers among the 4-6 members of the group. The "B" member is selected by allocating cases among all the members (i.e., not just those in the same geographic group) according to the sixth, seventh and eighth digits of the claimant's Social Security number.

These patterns, however, are not rigidly applied. Whenever a member is absent from the office, the computer distributes his or her caseload (both "A" and "B" cases) for that day among the available alternates.

[279] OHA Handbook, supra note 182, at 5-38. Some "B" members consider themselves responsible for undertaking a "de novo" review of the case, with a level of scrutiny equal to that of the "A" member. Others approach a "B" case with a presumption of going along with the "A" member's preferences if possible.

[280] Most differences between "A" and "B" members are quickly resolved in this fashion, with informal conversations identifying and resolving differences in perspectives.

[281] 20 C.F.R. §422.205(b) (1986).

Regulations permit the Appeals Council to consider a case "en banc" (i.e., with five or more members participating), 20 C.F.R. §422.205(e) (1986). In fact, however, this procedure has been implemented on only one occasion in the past several years, regarding a non-disability question of SSI.

matter.[281] (This tie-breaking procedure is followed perhaps 20-40 times per month.)

Regulations permit oral argument before the Appeals Council,[282] but this practice was never very common, and has atrophied virtually out of existence due to transportation costs and time concerns.[283] In the past several years the Appeals Council has heard oral argument in only a half dozen Social Security cases, none of which involved disability.[284] Appeals Council action is thus entirely a paper review.[285]

The decision of the Appeals Council is then effectuated, a process which may require returning the file to the OAO analyst for re-writing the decisional documents and notifications.[286]

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[282] 20 C.F.R. §§404.976(c), 416.1476(c) (1986).

[283] For an oral argument, SSA would either pay for Appeals Council members to travel to the claimant's locale, or pay the claimant's expenses for coming to Arlington, Virginia. 20 C.F.R. §§404.999a-999d, 416.1495-99 (1986). Oral argument requires a panel of at least three members. 20 C.F.R. §422.205(b) (1986).

[284] To warrant oral argument, there must be a significant issue of law or policy within the competence of the Appeals Council. This has happened occasionally with medicare-providers cases (which have recently been scheduled to be reassigned for hearing by ALJs within the Health Care Financing Administration of HHS) and rarely with SSA programs (e.g., definition of income for SSI financial eligibility, effect of state law on marriage or legitimacy for RSDHI), but not with disability claims.

[285] It is striking how frequently claimants and their representatives report that they have never had any human contact with Appeals Council members or OAO analysts while cases are pending before the Appeals Council. Many express considerable frustration at the inability to engage the decisionmakers, or even to contact them by telephone. They say they have experienced great difficulty even in locating the responsible officials to check on the status and future timetable of a case, and they unanimously reported to us an image of the Appeals Council as a hidden, isolated institution, unresponsive to outside inquiry.

[286] Appeals Council members agree with the analysts' recommendations regarding the ultimate outcome of the case in a very high percentage of claims. Interestingly, however, the exact percentage of such agreements is unclear.

(Footnote continued)

If the members have decided to remand the case, the file is mailed, with appropriate instructions, to the local hearing office. If the decision is to reverse an ALJ's denial and pay the claim, the file is mailed to the appropriate processing center for effectuation.

If the members decide to grant review, but do not elect to issue immediately a fully favorable decision (e.g., the members intend to hold the case at the Appeals Council pending further development, or to issue a "partially favorable" decision that grants some, but not all of the benefits sought by the claimant), then the claimant is notified of the proposed action and afforded 20 days to comment. The file is returned to the OAO branch to await receipt of the additional information or argumentation. When completed, the file ultimately returns to the same analyst, and to the same two members who saw it the first time around, for a final decision.

An Appeals Council decision, whenever it is reached, is written to conform in substance, if not always in detail, to the standards governing ALJ opinions. That is, the Appeals Council is supposed to explain what evidence it relied upon, what legal authority is central, and -- if the Appeals Council overturns a finding by the ALJ -- which considerations have led to the outcome.[287] During the past two years, the Appeals Council has

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286(continued)

OAO analysts reported to us that members accepted their recommendations as often as 98% of the time, while members said they rejected analysts' conclusions 10-20% of the time. We are not certain why there was such a wide difference in perceptions: perhaps we interviewed unrepresentative individuals from each group (unusually able analysts, unusually idiosyncratic members); perhaps each group's professional self image encourages it to promote its own perspective (e.g., analysts stress agreement, to demonstrate that they are serving the members well, while members stress disagreement, to underscore the Appeals Council's independence, as an organization not "captured" by its staff.)

A similar disparity arose when we asked how often "write-backs" occur (i.e., instances where a member returns the file to the analyst for correcting a decisional document or letter, even though the ultimate outcome of the case was not being changed. Analysts said this occurred in perhaps 10% of the cases; members estimated 20-35%.

made an effort to improve the caliber of its opinions, making them more responsive to the evidence and to the claimant's contentions. Notices about denials of review are still composed largely of standarized "boilerplate" language, but Appeals Council decisions on the merits are supposed to be more individualized.[288]

The Appeals Council member, like all other decisionmakers within the SSA claims system, must arrange his or her work habits to cope with the pressures of the caseload. Recent caseloads have ranged up to 500 cases per member per month, meaning that each member receives two or three dozen cases per day, and must try to dispose of them as rapidly as possible.[289] A case might stay on a member's desk a few days to a few weeks.[290]

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287 Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986); Beavers v. Secretary, 577 F.2d 383 (6th Cir. 1978); Bohr v. Schweiker, 565 F. Supp. 610 (E.D. Pa. 1983); Combs v. Weinberger, 501 F.2d 1361 (4th Cir. 1974).

288 See OHA Handbook, supra note 182, at 5-38-18 B.4. Claimants and their representatives, however, report that Appeals Council decisions occasionally still appear to be boilerplate, and that even when a degree of individualization has been undertaken, the opinions are still conclusory, incomplete and not fully comprehensible.

ALJ opinions, too, have been criticized as relying too heavily upon standardized boilerplate and rote recital of medical history, without sufficient analysis or elaboration of rationale. Heaney, supra note 83, at 11.

289 It is difficult to compute a meaningful statistic for how many cases an Appeals Council member might work on in a month, because it is debatable what should count as a separate case, when the same file is worked on more than one occasion, and by more than one member. One member explained that although the Appeals Council statistics might report an average of "only" 500 cases per month, the true figure would be much higher -- 750-800 cases per month -- if one includes cases taken as a "B" member or as an "Alternate A" member (i.e., cases reassigned in the absence of the person who would ordinarily be the "A" member.)

290 This volume of cases is a striking contrast to that accomplished elsewhere. Within SSA, for example, an ALJ might average 30 cases per month. Other agencies are radically different in this regard; many other ALJs carry caseloads of less than one-tenth the size of an SSA ALJ. 1983 ACUS Report, supra note 2, passim.

(Footnote continued)

A member therefore typically spends only 10-15 minutes reviewing an average case, although there is wide variation. A decision to agree with an analyst's recommendation to deny review is often very quick; decisions to grant review may take much longer. In reviewing a file, the member virtually never listens to the tape recording of the hearing.[291] Instead, he or she will

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290(continued)
In our observation, members of the Appeals Council were literally snowed under with files: virtually every member's office is jammed with case files, stacked on every available flat surface, and there are huge laundry hampers full of cases awaiting in the corridors. Whenever we would enter a member's office for an interview, a familiar minuet transpired, with the member lifting a stack of files off the couch, to clear a place for us to sit, then looking helplessly around the office for a clear spot to deposit them.

Other observers have noted the overwhelming physical reality of the piles of files within OHA:

> "Space constraints were evident in each component in the various buildings. Folders were lying in neat piles on the floor in aisles in the different sections of the D&F Branch. In DCA, hampers filled with folders sat in the corridors while other folders rested on the floor in large piles blocking an aisle awaiting placement on shelves in a holding area. Elsewhere, large numbers of full folder boxes were lying on the floor wherever space was available while waiting to be shipped to the Glebe Building."

Report by Process Review and Engineering Branch; Division of Management Studies and Analysis; Office of Management Planning and Analysis; Office of Management, Budget and Personnel, "Review of Folder Movement in the Office of Hearings and Appeals," p. 4 (Apr. 1984).

[291] Hearings before Social Security ALJs are not routinely transcribed, unless the case goes to court, so the only way to access the record of events before the ALJ is to listen to the tape recording. OHA Handbook, supra note 182, at 5-43. Members may do so, but only in rare instances do they take the time. Typical was one member's report that she had listened to a hearing tape only three times in six years, on particular occasions where there had been an allegation that the ALJ's tone and manner had created an unfair hearing
(Footnote continued)

review the analyst's report (including any notes the analyst may have taken if the analyst listened to the tape), read the ALJ's decision, and look deeply enough into the rest of the file to satisfy himself or herself that the analyst's recommendation is correct.[292]

6. Appeals Council Caseload -- New Court Filings

After a claim has traversed the entire administrative structure, a disappointed claimant may file a civil complaint in a federal district court. The decision of the Appeals Council constitutes a final action by the Secretary of HHS, exhausting administrative remedies and providing the basis upon which a request for judicial intervention may be grounded.

The number of new civil actions varies enormously from year to year, with recent statistics foreshadowing a figure of perhaps 10,000 new cases annually. The HHS Office of the General Council exercises the lead responsibility in preparing an answer or other initial responsive pleading, but the Appeals Council and other components of OHA have major responsibilities, too.

a. Preparing the Answer. When a civil action is initiated, the OAO Division of Civil Actions (DCA) obtains the claims file from the branch which initially handled it.[293] A DCA analyst

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291(continued)
environment.

Moreover, now that ALJs are using new four-track recorders, but the Appeals Council members still have only older two-track machines, members are not able to play hearing tapes without sending them back for conversion.

In a close case, a member might send the file back to OAO with instructions to the analyst to listen to the tape (or a segment) again and prepare a better abstract of it.

[292] A member might telephone the analyst to have a more detailed conversation about a particular case. These consultations are rare, however, because a substantial amount of time might elapse between the analyst's and the member's respective reviews of the file, and the analyst will have forgotten details by then.

[293] The Division of Civil Actions of OAO is separated into seven geographic branches. Each DCA branch is responsible for all cases in its area that proceed into federal court (except for a few experimental modules in other OAO divisions that are maintaining cognizance over their cases even if they

(Footnote continued)

determines whether the court complaint was timely,[294] arranges for transcription of the tape recording of the ALJ hearing,[295] and

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293(continued)
proceed from initial review into court.) Recently there have been proposals to move DCA out of OAO, and make it a litigation unit within the Office of the Associate Commissioner.

SSA has experienced a substantial problem of lost or misplaced case folders, delaying its response to new court filings in a number of instances. Sometimes the file is truly "lost," and must be reconstructed from other sources; more often there is a failure in the system for storing cases within OHA and tracking their movement from one office to the next. See Process Review Report, supra note 290, passim.

[294] If the court complaint is not timely (i.e., it was filed more than 60 days after receipt of the Appeals Council's denial, and no enlargement of time had been requested), the DCA analyst may seek a court dismissal of it. This is accomplished by preparing an affidavit of the Branch Chief, stating that the file reflects untimely filing, and mailing it to the SSA chief counsel for submission to the court. This type of case action is not reviewed by any member of the Appeals Council.

The Appeals Council has the authority to extend the 60-day period for filing a federal district court complaint, if the claimant so requests in writing and demonstrates good cause for the additional time. 20 C.F.R. §§404.982, 416.1482 (1986). The current practice is liberal with respect to requests for extensions: an analyst may grant up to an additional 60 days without a member's approval. OHA Handbook, supra note 182, at 5-68-10. If more than one extension is required, or if the original request for extension was not filed within the 60 day period, the analyst passes the case to a member for a decision about extension.

[295] 20 C.F.R. §§404.974, 416.1474 (1986). Transcription service is usually provided by private consultants, who have not always been reliable. The Contracts Staff of OAO transcribes tapes when there is insufficient time for sending it to an outside contractor, or where the contractor has already returned a transcript with an indication that much of it is inaudible.

SSA has also experienced frequent, severe problems with the
(Footnote continued)

helps assemble a completed file.

If new evidence was submitted after the Appeals Council's first consideration of the case, but before the federal court complaint, the DCA analyst evaluates it, and makes a recommendation as to whether the additional material warrants altering the Appeals Council's original action on the claim.

b. Supplemental Review. If new evidence does not persuade the Appeals Council to change its decision, the case proceeds in court.[296] However, the attorney handling the litigation for the government (an HHS regional attorney[297] or local U.S. Attorney)

295(continued)
quality of the tape recordings of ALJ hearings. If the tape is inaudible, no transcript can be prepared, the case can not be defended in court, and a new hearing is ordinarily required. SSA recently purchased a fleet of new high-quality four-track tape recorders for all ALJs, in the attempt to rectify this problem.

A recent study by the Office of Audit of the HHS Inspector General discovered that there had been major problems with the audibility, storage and retrieval system for tape recordings of ALJ hearings, and that the recent automated upgrading of that system had been disasterously ineffective. HHS Office of Inspector General, Office of Audit, "Review of Office of Hearings and Appeals Automated Mass Storage and Retrieval System," (1984).

[296] A transcript and answer must be filed within 60 days of the complaint. Only a few years ago, SSA was missing this deadline as often as 90% of the time, and contempt citations from district courts were common. In response, the HHS Office of General Counsel moved some attorneys and reprographics staff from Baltimore to Arlington, Virginia, to work more closely with OHA. OHA Operational Report, Sept. 30, 1986, p. 18. At the same time, OHA file and tape storage systems were improved. Now, the answer is timely filed approximately 95% of the time.

[297] A Regional Chief Counsel is HHS's chief litigator in one of the several regional offices around the country, and is primarily responsible for handling all of that region's departmental litigation, of which SSA disability cases constitute the overwhelming percentage. Some regional attorneys are designated as special assistant US Attorneys, and all interact closely with Department of Justice litigation staff.

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may then ask the Appeals Council to conduct a "supplemental review." If the litigator concludes that the case -- even if correctly denied, under existing SSA standards -- may prove indefensible in court,[298] he or she may recommend that the agency

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297(continued)
The Office of General Counsel (OGC) of the Department of Health and Human Services -- and especially the segment of OGC that serves as chief counsel to SSA -- also handles some of the disability litigation. The Baltimore headquarters staff is most likely to become involved in major test cases, class actions or appellate level work, where the Department of Justice's Office of the Solicitor General may also participate.

The pattern of interaction among these four groups of government attorneys (the HHS regional counsel, the SSA chief counsel in Baltimore, the local U.S. attorney, and the Department of Justice in Washington) varies considerably from locale to locale. In some areas, the HHS regional office takes the lead; elsewhere it is the U.S. attorney's office that handles the bulk of the disability litigation.

[298] The Social Security Administration used to win the overwhelming majority of its federal court cases (in both 1978 and 1979; SSA was affirmed 87% of the time and reversed only 13% of the time in court.) SSA's winning percentage began to fall in 1980, dropping to as low as 43% in 1984, before recovering to 54% in 1985 and 62% in 1986. (Figures do not include remands.) Gonya, _supra_ note 145, at 2. As recently as 1983, some observers noted that federal court decisions generally upheld SSA's management practices and "also reflect a high degree of judicial confidence in the competence of SSA." Liebman and Stewart, _supra_ note 147, at 1960.

SSA officials strongly believe that the agency's credibility in court has been severely damaged in recent years, particularly by the tide of CDR (termination of benefits) litigation. As one official put it, "We just can't win a case in the Second Circuit."

See also remarks by OHA Associate Commissioner Eileen Bradley in SSA videotape "Bradley Speaks" (1987) (saying "We can't be that bad" [as court loss statistics would suggest] and asking why SSA cases are overturned so often).

SSA officials and members of the Appeals Council also assert that many federal district court reversals or remands stem

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take the case back, on a Secretary's motion for remand, for further administrative processing (to pay the claim, to bolster the evidentiary record or to enhance the written rationale for denial.)

Because of the shorter court time deadlines in a supplemental review situation, an expedited procedure is followed: the attorney sends a memorandum to the Appeals Council, outlining the defects in the case, the difficulty in defending it, and the reasons why a remand may be appropriate. The memorandum and case file are routed back to the DCA analyst who studies them and makes an oral presentation to a panel of two Appeals Council members.[299] These two members (usually including one who reviewed the case when it first came to the Appeals Council)[300] then decide whether

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298(continued)
from a judge's simple sympathy for the disadvantaged claimant and an expansive -- or abusive -- interpretation of the "substantial evidence" test. They conclude that some judges afford very little deference to SSA findings of fact, and are regularly willing to re-weigh the evidence, effectively second-guessing an ALJ's credibility judgements. Therefore, they conclude, it may be futile to pursue a particular case in court, even if the Appeals Council believes its denial of benefits was proper.

Other observers, however, believe that the courts most often perform an honest and straightforward review of SSA decisions, affirming the majority, and reversing or remanding only when the administrative process has truly made an egregious error.

[299] The analyst may also need to undertake some legal research, and will typically prepare a short "panel memorandum," highlighting key facts and attaching salient exhibits.

From the time of receipt of a telecopied version of the regional attorney's memorandum, OAO and the Appeals Council have five days in which to respond.

[300] In some cases (where the original analyst had recommended denial of review, and a member had agreed), only one member of the Appeals Council has had prior exposure to the case. In others, both a former "A" and "B" member might be available. Assignment of members to supplemental review panels, however, is performed by the same computer selection routine that governs review level work, and no effort is made to increase (or decrease) the probability that the same member or members will again work on the case. The mechanism stresses equitable distribution of the caseload

(Footnote continued)

to seek a remand from the court or to insist on defending it.[301] A panel review of this sort occurs quite frequently -- perhaps 30-40 times per week. A typical panel meeting might last 15-30 minutes. In 83% of the 1507 cases brought for supplemental review during the past two years, the Appeals Council panel has agreed upon a remand.[302]

300(continued) among members, rather than an attempt at "continuity" (since a substantial period of time may already have elapsed between the review level and the supplemental review of the case).

[301] In one sense, a panel's decision, upon supplemental review, to take a case back for further administrative action is an admission that the Appeals Council erred in denying review (or in denying benefits) the first time around. Often the member primarily responsible for the first decision is also involved in the supplemental review, which provides a closer look at a problem case.

In another sense, however, a voluntary remand might not be a confession of error -- new evidence might have been provided that alters the nature of the case.

Even more significant, the supplemental review in effect adds a new possible criterion for an award of disability benefits: the indefensibility of the case in court. This is the first time in the administrative ladder that this factor is explicitly addressed, and it introduces a set of considerations independent from the medical and vocational factors of the listings or grids.

This factor of practical litigation policy is otherwise strikingly absent in the SSA claims adjudicative hierarchy. Most other government agencies have, and regularly utilize, the authority to settle or compromise cases, or to elect not to prosecute a matter for tactical reasons. SSA exercises a comparable power only very late in the process -- after administrative remedies have been exhausted and a federal court case has been filed. See National Center Study, supra note 1, at 131-32. The SSA flexibility, moreover, is not really a power to settle or compromise a claim -- only rarely is there a discrete issue (such as onset or termination date of disability) over which bargaining is possible. More typically, SSA is able to exercise only the discretion to abandon its position and pay the claim entirely.

[302] Figures are through August 31, 1986. The supplemental

(Footnote continued)

If the panel decides that the case should be pursued in court, but the litigating attorney still feels that a remand is more appropriate, he or she may then request additional review before a "super panel," an expanded group composed of one member from the original panel, the Deputy Chair of the Appeals Council, and a third member designated by the Deputy Chair.[303]

Similar procedures are followed for the analyst's oral presentation. A super panel is quite rare, occurring 69 times in the two years since the procedure was inaugurated.[304] On only 10

302(continued) review program was initiated in FY 1985. OHA Operational Report, p. 8 (Sept. 30, 1986).

[303] SSA regional attorneys vary widely in their use of protests to Appeals Council panels and super panels, some being more sanguine about defending a flawed case in court.

The regional attorneys also vary widely in the vigor with which they assert the SSA position in a marginal disability case. Sometimes a regional attorney will not even file a brief, an omission which irritates members of the Appeals Council who feel that their position has been undercut.

Similar tensions occasionally arise with respect to appeals of cases lost in the district court. Regional attorneys or Department of Justice litigators have not always been as keen as Appeals Council members on fighting to sustain SSA positions.

The attorneys, on the other hand, may feel that SSA is at fault for failing to appreciate the difficulty -- and the growing professional responsibility considerations -- in pursuing an unjustified case. Weinstein, supra note 82, at 926.

[304] Prior to the institution of the super panel procedures, a regional attorney who was disappointed by a panel's decision to pursue the claim, could protest directly to the Deputy Chair of the Appeals Council (and ultimately to the Associate Commissioner for OHA or to the SSA Chief Counsel.)

There is some sentiment for returning to that system, based on the judgement that super panels consume a substantial amount of members' and analysts' time, especially since the Deputy Chair (who sits on all super panels and also appoints one of the other members) is likely to have the last word on remand anyway.

of these occasions has the Appeals Council resisted the regional attorney's urging for a remand.[305]

7. Appeals Council Caseload -- Court Decisions

Once the decision has been made to defend a case in court, the Appeals Council may participate in its evolution in yet other ways.

At the outset, however, what is most noteworthy is the relative degree of uninvolvement by the Appeals Council at this stage -- there is no system for regular monitoring of a disability case as it progresses through the judicial system. That is, whether the court ultimately affirms or reverses the SSA position, the Appeals Council is not directly notified, and members may learn of the court outcome only haphazardly, if at all. Even if a case is remanded from the court to the Appeals Council, there is little direct feedback to the particular member or members who worked the case initially.[306]

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[305] Under the 1980 amendments, the Secretary must show "good cause" to support a remand order. A claimant's attorney might resist a Secretary's motion for remand, concluding that an outright court reversal of SSA is appropriate on the present record and that the additional administrative processing would be used by SSA only to bolster (not to pay) its weak case. Nevertheless, the Secretary's motion for remand is almost invariably granted. But see Larkin v. Heckler, 584 F. Supp. 512 (N.D. Cal. 1984) (Secretary's motion for remand denied, where good cause was not shown and it appeared government was seeking remand merely to delay the case.)

[306] In part, this failure to follow the court disposition of a particular case is simply a function of the numbers: since an Appeals Council member deals with so many cases, he or she retains little special interest or curiosity about those that might be resolved, months or years later, in court. In part, too, it is due to a sentiment among members that often little could be learned from studious attention to court actions: if the district court judge is simply re-weighing the administrative findings of fact, there is nothing of an important precedential nature in the feedback.

In a similar fashion, ALJs are not routinely advised about the subsequent fate of cases they decide. If the Appeals Council or federal judge reverses an ALJ's decision without remanding it, there is no feedback mechanism that serves the function of education of the ALJ.

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a. Court Remands. The Appeals Council as an organization may play a major role in a case remanded by a federal court with instructions to conduct a new hearing, compile new evidence, etc. If the court's directive is sufficiently clear, requiring no elaboration by the Appeals Council, a "fast track" procedure is utilized, routing the file directly to the appropriate local hearing office for an ALJ to carry out the court's orders. If the Appeals Council determines that some interpretation or additional guidance is required, the Appeals Council supplies that exposition before transmitting the case to an ALJ.[307]

306(continued)
SSA has recently created a Litigation Strategy Task Force, to review SSA litigation policies and procedures and make recommendations regarding improvements. The Associate Commissioner for OHA chairs the task force, and three Appeals Council members serve on it. Memorandum from Eileen Bradley, September 14, 1987.

[307] There is some controversy over the reliance upon "fast track" remands. It is undoubtedly quicker for an OAO analyst to forward a court order down to the ALJ directly, without occupying the time and attention of an Appeals Council member. But many people feel that analysts are not always able to discern which cases require additional commentary or instruction from the Appeals Council before release to the ALJ. Some members prefer to see all remand orders, even if they turn out to be relatively straightforward, not requiring any elaboration beyond the "short form" that an analyst would use on his or her own.

Where the Appeals Council does elaborate on the court's order, it most typically does so to resolve an apparent conflict between the order and a Social Security Ruling, or to instruct the ALJ to update the medical evidence in the record.

The Appeals Council might also, at this point, seek an appeal, a reargument, or a clarification of the court's remand order, but these are quite rare.

The historical record reveals wide variation on whether court remands are likely to be processed by the Appeals Council only, or be referred to ALJs, too. For example, in FY 1965, 13.2% of the court remands were retained by the Appeals Council and never further remanded to the ALJ; comparable figures for other years are: FY 1966, 26.6%; FY 1967, 47.4%; FY 1968, 23.3%; FY 1969, 16.9%; FY 1970, 36.5%; and FY 1971, 43.5%. Department of Health, Education, and

(Footnote continued)

In a court remand situation, regulations do not permit an ALJ to issue a final decision as would be done in the usual circumstance. Instead, the ALJ prepares a "recommended decision," which is forwarded to the Appeals Council. A copy is also provided to the claimant, who is afforded an opportunity to respond before the Appeals Council considers it. The Appeals Council may then adopt or modify the recommended decision (or, rarely, re-remand it for further work by the ALJ), and the final decision is sent out over the signature of two members.[308]

The standard of review followed by the Appeals Council in court-remanded cases is not the "substantial evidence" test used in analyzing ordinary ALJ decisions; instead, since the Appeals Council exercises more responsibility in this type of situation, it relies on something more akin to a "preponderance of the evidence" test in determining what to do with the case.[309] For similar reasons, OAO analysts and Appeals Council members typically devote much more time and attention to review of an ALJ's recommended decision in a remand case then they would to an ALJ's final decision in a standard "review level" case.

307(continued) Welfare, Briefing Pamphlet for the Bureau of Hearings and Appeals, June 30, 1971, p. 24.

[308] 20 C.F.R. §§404.977, 416.1477 (1986).

SSA is interested in expediting this process, and has issued a proposed rule, 52 Fed. Reg. 38466 (Oct. 16, 1987), under which an ALJ could issue a conventional decision, not merely a recommended decision, in remand cases. Instead of automatically coming before the Appeals Council, then, the case would be subject to request-for-review or own-motion review as are other ALJ decisions.

[309] An ALJ decision in an ordinary case becomes "final" if nothing is done to review it. In a court remand situation, however, the recommended decision does not become final unless the Appeals Council adopts it. The Appeals Council and DCA devote far more time and attention to remanded cases than to others.

If the Appeals Council is not satisfied with the work of the ALJ, it may order a second remand. In rare cases, even a third remand may be required, although internal procedures require the approval of the Director of OAO before an analyst could recommend a third remand, and the approval of the Deputy Chair before a member could order one.

b. Court Appeals. The Appeals Council is also occasionally involved in SSA actions subsequent to a court decision, and may be consulted about the desirability of appealing an adverse decision, seeking clarification of its terms, etc. These litigation policy decisions, of course, involve many other components of SSA, as well as litigators from the Departments of HHS and Justice.

8. Other Appeals Council Functions

In addition to reviewing disability cases, the Appeals Council performs a variety of other functions. These include hearing a small but non-trivial number of non-disability cases (e.g., survivor's claims, where the relationship is contested; Medicare services providers' claims, etc.)[310]

In addition, although the vast bulk of Appeals Council decisions are fact-based, not interpretive or policymaking, the Appeals Council also participates in the formulation of SSA policy in several ways.[311] One is through the process of highlighting decisions that might usefully be converted into Social Security Rulings, and referring those matters to the Office of Regulations, which prepares SSRs.[312] Another policymaking step is in deciding the rare case that truly does break new ground in construing Social Security law in new circumstances.[313]

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[310] Disability cases account for approximately 95% of the Appeals Council's docket. Medicare cases are in the process of being transferred to a new cadre of ALJs and a new appellate body within the Health Care Financing Administration of HHS. See Kinney, "The Medicare Appeals System for Coverage and Payment Disputes: Achieving Fairness in a Time of Constraint," 1 Administrative L. J. No. 1, p. 1 (1987).

[311] The position description for a member of the Appeals Council as far back as 1960 included the role of "participating in the formulation of substantive and procedural policies," and "participating in the planning and preparation of all necessary rules and regulations relating to fair hearings." See Horsky, supra note 185, at 300b.

[312] New SSRs can come from many sources. One official we interviewed suggested that one of the most valuable current functions of the Appeals Council is its occasional role as a focus for ALJs and members to identify recurrent problems in implementing SSA policies and practices, some of which may be corrected via SSRs. The Appeals Council may also have the opportunity to comment on the evolution of other expressions of SSA policy and law, such as draft regulations or internal circulars.

A third policy-related role is the occasional tasking of the Appeals Council to study the impact of proposed new disability standards. For example, when the regulations for the new mental impairments listings were being evaluated for additional cost assessments by the Office of Management and Budget, the Appeals Council was asked to undertake a substantial examination of the likelihood that large numbers of cases would be decided differently under the new standards.[314] Individual Appeals Council members have also participated in SSA task forces mandated to review and recommend changes in major SSA policies such as "severity" or medical improvements, and they have also served on OHA committees studying internal reorganization possibilities.[315]

In addition, informal "policy" is made whenever members meet with each other, consult about shared problems, and derive a mutually-acceptable solution that might be applied in future cases, even if it does not "govern" the subsequent decisions in a strict sense. The full Appeals Council holds monthly meetings, at which precedential matters of this sort might be addressed, and

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313 One example of a set of cases in which the Appeals Council granted review because of a "broad policy or procedural issue that may affect the public generally," 20 C.F.R. §§404.970, 416.1470 (1986), arose in SSI disability cases a few years ago. In that instance, the Appeals Council decided, as a matter of first impression, that Bureau of Indian Affairs payments to a Navajo tribal entity, which then passed the funds to a group of approximately 150 individuals, should count against the ultimate recipients' SSI income and resource ceilings.

314 To conduct this study, Appeals Council members examined hundreds of "dead" cases (i.e., ones in which mental impairment claims had been raised and ultimately resolved) and prepared alternative evaluations, pursuant to the existing and the proposed standards. When the study revealed that the new mental impairment listings were unlikely to result in a large increase in the number of awards made, OMB approved the new regulations.

Similarly, members of the Appeals Council devoted a substantial amount of time to participation in the studies culminating in the Bellmon Report, supra note 1.

315 These ad hoc review bodies were chartered in response to public criticisms of particular SSA policies. The Appeals Council members were asked to participate, based on their perspectives as reviewers of a large run of cases, by identifying recurrent issues or problems.

the regional groups of members confer much more frequently.[316]

The Appeals Council used to play a somewhat larger role in making policy. Regular en banc Appeals Council meetings used to discuss substantive policy matters much more frequently, and the Appeals Council would vote, and record its agreement in short "minutes," which were then disseminated as guidance within OHA. These minutes were not binding on other components of SSA, but they served to advertise within the adjudicatory process how the Appeals Council was going to handle a particular question and, therefore, suggested what DDSs and ALJs should do in order to have their decisions affirmed.[317]

Finally, members of the Appeals Council are also occasionally called upon to perform various administrative, training, and public relations services.[318]

9. Costs of Appeals Council

The more subjective costs and benefits of the Appeals Council are reviewed below. Even the calculation of financial costs is not straightforward: SSA accounting is not ordinarily done in a fashion that permits separate cost assessments of discrete bureaucratic units.

The best fiscal information available for FY 1987 costs associated with the existence and operation of the Appeals Council is:[319]

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[316] Members may place substantive items of this sort on the agenda for an Appeals Council meeting, but this has occurred relatively infrequently. Informal consultation -- among members of a geographic grouping, between the "A" and "B" members on a case, or among others -- occurs on a daily basis.

[317] The OHA Law Reporter, the Office of Hearings and Appeals' quarterly summary of selected actions by ALJs, the Appeals Council, and other bodies relevant to SSA, still contains an entry for Appeals Council minutes in its table of contents, but it is an entry that has had nothing to report for several successive quarters.

[318] For example, members have served as instructors in the training courses for new ALJs, in legal education, and in bar association seminars.

[319] Data provided in letter to authors from Appeals Council member William Taylor, July 15, 1987 (based on actual figures through May 1987, and estimates for entire year).

OAO Salaries and Benefits	$26,570,742
Other OAO costs	1,946,384
OAO Subtotal	28,517,126
Appeals Council Salaries and Benefits	2,805,251
Other Appeals Council Costs	347,981
Appeals Council Subtotal	3,153,232
Total for OAO and Appeals Council	$31,670,358

III. Current and Potential Goals of the Appeals Council

Any evaluation of the success of an institution such as the Appeals Council, and any determination of its proper role within the bureaucracy, must begin with an articulation of organizational goals -- a statement of what it is that the Appeals Council is, or ought to be, trying to accomplish.

Goal identification for a subunit of a complex department is not easy -- many conflicting pressures vie for attention. Nonetheless, we have identified a spectrum of six related (indeed, partially conflicting) functions that the Appeals Council does, might or ought to pursue in some measure: (A) policy development; (B) improvement of factual accuracy in handling cases; (C) assurance of program integrity; (D) addition of consistency in decisionmaking; (E) improvement of system-wide efficiency; and (F) fostering of greater public acceptability of the program. The following sections analyze the Appeals Council's record in pursuing these objectives, laying the basis for our subsequent evaluations and recommendations.

A. Policy Development

A major -- indeed the primary -- function of most administrative review bodies is to participate in, or even lead, the process of developing, articulating and implementing agency policy.[320] Whether this appellate authority resides in the head of the agency or in some lesser body, the traditional scheme of administrative law generally locates responsibility for generating policy at the top of the appellate pyramid.[321]

This policy function may be executed in many ways: by predecential case adjudication, by generating prospective rules, or by a mixture of methods.[322] What is important to the traditional structure of the typical government agency, however, is a self-conscious appellate authority, which deliberately attempts to look past the run of case-by-case determinations and extrapolate into more generally-applicable policy.[323]

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[320] 5 U.S.C. §557(b) (Supp. III, 1985) ("on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"); see ACUS Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency, 305.68-6 (1968).

[321] "An agency head may, if he deems it proper, reverse the ALJ on any ground so long as there is a reasonable basis for the ultimate decision, a requirement that would obtain in all events." 1983 ACUS Rep., supra note 2, at 122.

[322] In the traditional model, the hearing level is dedicated to the resolution of factual questions: taking evidence and (Footnote continued)

In the Social Security Administration, however, this traditional model has been largely abandoned. Members of the Appeals Council unanimously report that their function is now almost exclusively case-handling, not policymaking. They define their role as reviewers of the work of the ALJs, processing an incessant run of individual cases with little or no time, inclination or opportunity to participate in broader policymaking. The job description of the Appeals Council as an entity has been defined, for practical purposes, as "getting the cases worked," paying attention to the particular file in front of the Council at a particular time, without much emphasis upon the broader perspective.[324]

SSA leadership officials, too, agree that the current operation of the Appeals Council has come to resemble a factory assembly line: members' current daily fare is to process the cases individually, without much participation in the policy function.

As noted, this picture is not entirely uniform: members have occasionally identified areas appropriate for future rulemaking, and individual members have from time to time been detailed to participate in agency-wide policy-review bodies. But the Appeals Council as such has largely forfeited its former role (even then, a limited one) in the creation of SSA policy.

322(continued)
applying existing legal categories to each succeeding set of circumstances. Of course, this, too, is to some extent a "policy" role -- a hearing officer often makes policy interstitially by helping agency standards evolve in individual cases. Nonetheless, the underlying distinction remains: in most agencies, the hearing level is for finding facts, while the appellate level is for generating and overseeing policy.

[323] See 1 Koch, supra note 2, §§6.73 & 9.3.

[324] Mashaw, supra note 1, at 105 ("[T]he AC is not the principal policy arm of the secretary or the commissioner with respect to the [RSDHI] program."); Statement of Burton Berkley, Deputy Chair of the Appeals Council, Cleveland Transcript, supra note 1, at 271 ("We [the Appeals Council] are not a policymaking body. We adjudicate cases that come along but we adjudicate them in accordance with published policy.")

Why has this transformation occurred? Why doesn't the Appeals Council -- the only entity within SSA that regularly assays a large run of cases as they leave the administrative process and again as they flow back from courts -- use its special perspective to make a greater contribution to agency policy? Three reasons seem apparent.

First and foremost is the crush of the cases. The Appeals Council has, over the past several years, been swallowed whole by its docket. When 40,000, 60,000 or 80,000 case files per year stack up in the Appeals Council mailroom, the entire bureaucracy must be marshalled to process them. When a member of the Appeals Council is confronted by 30 cases each day, with the certain knowledge that a failure to dispatch them means that 60 files will require action tomorrow, there is precious little time for reflection, for the pausing from chaos to generate mature policy recommendations. When the Appeals Council is so driven to process its files, as it has been for close to a decade, it is not surprising that all its institutional resources will be bent to that purpose, and all other possible functions will atrophy.

In addition to the tyranny of its caseload, the Appeals Council's policy function has been degraded further by a second factor: the evolution by SSA of a substantial alternative mechanism for creating policy via rulemaking.[325]

SSA has developed a complex, multi-faceted capability for making policy pronouncements. Formal regulations, promulgated through the Federal Register notice-and-comment procedures of the APA; less weighty interpretive standards of Social Security Rulings; and numerous less formal internal policy statements, circulars and manuals all testify to SSA's ability to make policy without substantial Appeals Council input.[326] These various mechanisms are not perfect -- many, in fact, are ponderously slow, incomplete or inconsistent -- but they evidence the fact that SSA has not waited for the Appeals Council. The process of policy-generation has had to continue, and SSA has developed systems for propounding policy in a variety of forms, even without the usual sort of assistance provided by appellate administrative review bodies.[327]

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[325] Rulemaking and adjudication are partially complementary, but partially competing, methods of enunciating agency policy. The Attorney General's Manual on the Administrative Procedure Act (1947), intended to give advice to the agencies on compliance with the APA, observed:

> "[T]he entire Act is based on a dichotomy between rule making and adjudication. . . . Rule making is . . . essentially legislative in nature, not only because it operates in the future but because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future rather than the valuation of respondent's past conduct. . . ." Id. at 14-15.

This process suggests a third factor, geography, which has contributed to the decline of the Appeals Council's policy role. Located in Arlington, Virginia, deliberately separated from the Baltimore headquarters of SSA and from the Washington, DC, headquarters of HHS, the Appeals Council has been largely

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326 The balance among regulations, SSRs, and the less visible policy devices is a difficult one to strike. On the one hand, considerations of speed, ease, and flexibility will incline an agency toward the less ponderous devices -- and SSA has a particularly tough time producing formal regulations with any dispatch. On the other hand, the public's right to know about, and to influence the content of, the standards governing claims adjudication will create pressures to adopt the more formal mechanisms -- and SSA has a special responsibility for avoiding the creation of "secret law."

We note that Congress has pressed SSA to publish more, to rely less upon internal policy pronouncements that are not generally available to the public, Pub. L. No. 98-460, §10; and we also observe that the agency seems to be retreating somewhat from reliance upon SSRs. It is, however, beyond the scope of this work to attempt to delineate a proper dividing line between the various policy tools.

327 "In reviewing adjudications or in adjudicating matters himself, the agency head necessarily is sensitive to the political considerations that informed the policy decisionmaking. Indeed, it is his capacity, unique within the agency, to evaluate those considerations that prompted the APA's crafters to retain agency review of adjudications; wholly independent adjudications, lacking the agency head's sensitivity to factors not easily captured in rule form, might produce policies at odds with those the agency, acting within its delegated power, seeks to advance." 1983 ACUS Rep., supra note 2, at 122. See also Freedman Rep., supra note 2, at 126-27, 134-37; but see Strauss, "Rules Adjudication and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law", 74 Colum. L. Rev. 1231, 1264 (1974).

insulated from partisan interference in individual cases. This physical removal, however, has also made it more difficult for commentary to flow in the other direction.[328] It is simply less convenient to rely upon the Appeals Council for policy input when its members are not physically present in the arena where policy is being made.

In short, the Appeals Council has been almost entirely cut out of the action in SSA policymaking. This was largely not a deliberate ploy of power politics -- indeed, our conversations with SSA officials revealed that they want and need a greater policy input from the Appeals Council, and that they have been disappointed at not hearing more from that source. Rather, the image emerges of a conduit between the Appeals Council and the Baltimore headquarters -- a channel for important input into agency policy -- that has become clogged due to the magnitude of the Appeals Council's case responsibilities, and that has subsequently fallen into disuse. Appeals Council members were generally surprised to learn from us that the SSA officials would welcome their input on policy, and the policymakers, conversely, were surprised that the Appeals Council was not attempting to assert a bigger role. Until the Appeals Council caseload can be thinned out appreciably, however, there is little hope for reactivation of a policy link between Arlington and Baltimore.

Independence vs. accountability. An important ramification of the recent evolution of the Appeals Council into exclusively a case-handling role is the question of members' accountability. Traditionally, Appeals Council members have been ordinary SSA civil service employees, evaluated for performance and eligible for merit pay -- unlike ALJs, whose independence is secured by APA protections.

The rationale for this structure is the concept that the Appeals Council acts as the "head of the agency," performing a review function in the Secretary's stead, to carry out -- not to be isolated from -- policy decisions. Indeed, in many other agencies this model (policy review by non-APA-protected officials after neutral fact-finding by independent ALJs) seems to make sense.[329]

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[328] In addition to its physical removal, OHA has been bureaucratically aloof from the rest of SSA, prizing a direct bureaucratic link to the Commissioner or to the Secretary, outside the usual action channels. This, too, supports the aura of independence in adjudication, but it simultaneously deprives the Appeals Council of a voice in policymaking.

Even within OHA, distance is maintained. The Appeals Council is not located within the same building as the Associate Commissioner or the Chief ALJ.

In the context of SSA, however, this legal fiction now seems to obfuscate more than it assists. In fact, the Appeals Council is not the alter ego of the Secretary: the Appeals Council never meets with the Secretary, the Commissioner or even the Deputy Commissioner, and those officials have little awareness of the Appeals Council's daily work. The Appeals Council does not carry out the will of political appointees: members have indignantly stressed that they would resent any attempt to influence their decisions in particular cases or en masse. The Appeals Council does not see its role as dismissing an ALJ's fact-finding in order to advance a partisan choice: the members instead feel they are bound by precisely the same legal standards and policies that ALJs are supposed to be following.

Moreover, Appeals Council members today enjoy de facto protection. They are no more and no less "accountable" than ALJs; no more or less prone to ignore lawful direction; no more or less subject, in any operational sense, to agency discipline.[330] The selection process and the qualifications for membership, similarly, are much more like those of ALJs than they are like SSA policymakers.

This combination of de facto protection but de jure vulnerability seems anomalous. If members of the Appeals Council perform essentially ALJ-like functions, and if their mission is strictly to review cases, then the relationship between ALJ and

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[329] "Thus, officials insulated from outside contacts and internal controls might be more concerned with accuracy of ALJs' factual determinations, while policy-sensitive officials are more concerned with the effect of ALJs' decisions on particular parties or policies." Cass, supra note 2, at 28.

[330] We do not undertake here to assess the extent and effectiveness of the APA protections accorded to Social Security Administration ALJs. Some have concluded that the Merit Systems Protection Board apparatus is so rigid that effective discipline of aberrant ALJs, even for important transgressions, is a practical impossibility. Others have contended that SSA actions have, in fact, produced changes in ALJ behaviors, through indirect pressures and the creation of a particular "adjudicative climate". In any event, it is clear that the legal protections -- as distinguished from the de facto protections -- enjoyed by the ALJs are stronger than those accorded to the members of the Appeals Council.

Appeals Council seems to parallel that between federal district courts and circuit courts, and equivalent job protection and status for both tiers seem compelling. Why insist on the maintenance of de facto independence but resist making it de jure?

If, on the other hand, the function of the Appeals Council is more policy-oriented, more akin to those of the SSA leadership, then why should members not discard their current (misleading) partial trappings of independence and become frankly political?

To a large extent, this question, too, boils down to the issue of caseload: if the Appeals Council is so burdened by individual files that it does little else besides review ALJ decisions, then it seems futile to pretend that the Appeals Council is performing a "Secretarial" function requiring direct accountability. Whether that model of administrative structure is sensible in other agencies, where the smaller number (and greater importance) of the cases makes Secretarial intervention possible, it is simply not an accurate portrait of today's SSA.

B. Factual Accuracy in Case Handling

If the Appeals Council has today largely ceded to others within the SSA bureaucracy any major role in agency policy formulation, the next leading goal, or potential goal, of an appellate review body would concern factual accuracy -- the attempt to ensure correct administrative action on individual claims. This is, in fact, what members of the Appeals Council say they now do: review individual cases seriatim, to catch errors made by ALJs.

1. Identifying and Measuring Accuracy

At the outset, it must be stressed that "accuracy" in a disability case is execrably difficult to define, let alone measure, pursue or achieve. No one we spoke with was able to begin the articulation of a workable definition of accuracy, and previous studies of and by SSA have similarly foundered upon this point.[331] The inability to derive an objective definition of accuracy has often resulted in conflating this goal with other (only slightly less subjective) program goals such as "uniformity" or "consistency," which we elaborate below.

Why is it so difficult to define and measure accuracy? The crux of the problem lies in the complexity, subtlety and subjectivity of the underlying variable itself: disability.[332] The human organism is marvelously complex; the impairments which can affect it are diverse and protean. Disability, moreover, is not exclusively a medical concept -- at core, in fact, it is a vocational measurement which inherently draws upon variations in economic conditions, social mores and the political climate.

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[331] National Center Study, supra note 1, at xx ("Investigation of the accuracy of the BHA hearing process...leads very quickly to the realization that there is no accepted external standard for evaluating acuracy."); Cass, supra note 2, at 15; Cofer, supra note 1, at 86.

Rigid rules are neither possible nor desirable in adjudicating disability cases. They are impossible because of the vast array of circumstances of the cases: one ALJ has estimated that there are some 3000 variables at play in making disability adjudications, and they may interact in a nearly infinite variety of combinations. To objectify the correct melding of all these factors would be an unmanageable burden.

Even if it were possible, excessive reliance upon rigid rules would be undesirable for institutions of broad remedial purposes such as the disability programs.[333] Even those relatively pronounced categorizing rules already in the system are not slavishly applied: the Listings of Impairments may be "equaled," rather than precisely "met," acknowledging the variability of individual circumstances; even the "age" category of the grids (which would appear at first blush to be the least susceptible to manipulation), is not to be applied "mechanically in a borderline situation."[334]

This does not necessarily mean that accuracy is an empty term: the statutory definition of disability must be honored, and SSA regulations attempt, as far as possible, to translate it into operational terms. It does mean, however, that accuracy is to a large extent in the eye of the beholder, and that the adjudicatory system is based, as it must be, on the idea that only subjective human judgment can integrate all the variables so as to give the closest approximation of decisional accuracy.

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[332] As noted, the Appeals Council handles a variety of other types of cases, but disability appeals constitute 95% of the burden. Significantly, the other types of cases (where age, survivorship, etc. are in issue) pose far fewer concerns over the concept of accuracy.

[333] Davis, supra note 1, at 19 ("Rules will not suffice. Rules must be supplemented with discretion. . . . For many circumstances the mechanical application of a rule means injustice; what is needed is individualized justice, that is, justice which to the appropriate extent is tailored to the needs of the individual case.")

[334] 20 C.F.R. §§404.1563, 416.963 (1986). In fact, however, the flexibility contained in many of these provisions is rarely exercised. SSA adjudicators, for example, infrequently take advantage of their ability to apply the "age" categories other than mechanically.

2. Some False Measures of Accuracy

The absence of a simple operational definition of disability and an accompanying irrefutable standard of accuracy has led to experimentation with other substitute standards of accuracy, each of which we find seriously deficient.

a. The Last Word. The most commonly used de facto standard of accuracy seems to be that "whoever speaks last, and effectively affirms or reverses earlier decisionmakers, is deemed to be the most 'accurate' authority." Thus, the Appeals Council is said to check the accuracy of the determinations of ALJs; the various tiers of "quality assurance" review within SSA give report cards to the units they monitor; and federal court reversals are often taken as a measure of erroneous determinations by the administrative bureaucracy. While we believe these cross-unit variations are significant, we do not consider them to be per se statements about accuracy, for a variety of reasons.

First, the underlying case at issue evolves constantly throughout the review ladder. Under existing SSA procedures, it is relatively easy to add new evidence to the file as the case progresses from DDS to ALJ to Appeals Council and even to federal court. The subsequent authorities may not, therefore, truly be second-guessing the earlier adjudicators; it may be quite a different case that is marshalled at each step.

Second, the review process at the several stages is asymmetric. DDS work, for example, is typically an assessment of papers only; ALJs see the claimants face to face, and can judge credibility directly; the Appeals Council has access to the tape recording of the hearing, but precious little time to do anything other than a paper review. That these tiers will come to different decisions in many cases is not surprising; to call one of them "more accurate" merely because it is chronologically last is problematic.

In addition, the various layers of review differ in the substantive standards they apply. The ALJ hearing is explicitly de novo, and in fact ALJs seem to demonstrate no deference whatsoever to DDS conclusions. The Appeals Council and the reviewing courts are supposed to be bound by a "substantial evidence" test; in fact, those being reviewed contend that it is often a substitution of judgment or personal preferences. That is, the Appeals Council members feel that federal court reversals are sometimes based upon sheer sympathy for the claimant, not upon a dispassionate analysis of substantial evidence to support the earlier decision. Ironically, ALJs often feel the same way about the Appeals Council -- that its reversals often derive from different opinions on the merits, not from a true "substantial evidence" assessment.

Finally, the reviewers' perspective about accuracy is bound to be affected by the run of cases reviewed. Federal courts, for example, see a highly skewed selection: only denials (or terminations) are brought to court, and then only when the claimant and a representative can assemble a colorable case. Each federal judge, moreover, sees only a small number of cases per year, not the vast outpouring of SSA work.

Federal judges never come into contact with any of the hundreds of thousands of cases paid by the SSA bureaucracy each year. Nor do they see the general competence, sensitivity and generosity with which those cases are usually handled. Rather, they see only those cases, from the two million or so presented each year, in which some valid argument can be made that the system has failed. The court's perspective thus naturally inclines toward that of the champion of the downtrodden faced by a callous bureaucracy. They do not appreciate that court action is itself aberrational: of the annual total of awards made in all disability cases, approximately 79% come at the initial level, 8% are made on reconsideration; 12% at the ALJ stage and .2% by the Appeals Council. Courts, for all their time and attention, account for only .4% of all awards.[335]

The difficulty of relying upon "who speaks last" as a definition of accuracy is underscored by a 1982 study mandated by Congress and conducted by SSA as part of the Bellmon amendment.[336] For this study, 3600 randomly selected ALJ decisions (both awards and denials) were presented for review by three groups: other ALJs, Appeals Council members, and quality control monitors for SSA's Office of Assessment. After studying the files, the Appeals Council group reported that it agreed with only 63% of the original ALJ awards. However, the Appeals Council also disagreed with 21% of the ALJ denials. Even wider disparities were reported among the ALJ and Office of Assessment groups, suggesting a conclusion that "accuracy" in decisionmaking, even when review is confined within relatively standardized limits, remains highly subjective.

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[335] But see Heaney, supra note 83, at 15 ("The Court of Appeals for the Eighth Circuit is fully aware of the large volume of cases that are reviewed by the Secretary, and can appreciate the administrative problems that may arise as a result of processing so many cases. Nevertheless....")

[336] Bellmon Rep., supra note 1, passim.

b. The 50% Solution. If there is no clearly "superior" level of decisionmaker, no ultimate arbiter of accuracy, what should one expect from SSA appeals? Some outside observers, as well as some participants within SSA, seem to be drawn to a focus upon crude statistics, as if the reversal rates of the various tiers of administrative and court review could, by themselves, demonstrate the accuracy, and the value, of a particular adjudication.

Thus, some opine that the 17% allowance rate at reconsideration, and the 5% allowance rate at the Appeals Council are, per se "too low"; while others argue that the approximately 50% award rates at the ALJ and federal court stages are, on their face, "too high."

We reject this focus upon the raw data as a valid index of the propriety of adjudication. We do not purport to know what the "correct" award rate ought to be at any particular tier or for the disability system as a whole, and we distrust axiomatic assertions translating award statistics into statements about accuracy, institutional vigor, or the like.

The most careful empirical studies of the statistical outcomes of litigation seem to support our skepticism. Priest and others who have studied general civil litigation have concluded that controversies going to court tend to result, over a large run of cases, in a roughly even split in results between plaintiffs and defendants. The reasons for this 50% phenomenon are multiple, but they center upon the litigants (and their attorneys) symmetrically assessing the costs and benefits of litigation, as revealed through evolving precedent.[337]

If the Priest observations were applicable to SSA, then it would be easier to establish statistical benchmarks for appellate reviewers. That is, if litigants chose to appeal only the close, marginal cases to a subsequent level, then a 50% reversal rate at each stage would not be surprising and would not, by itself, be indicative of gross error. As the easy cases are weeded out of the system (by paying those obviously disabled and by convincing obvious ineligibles of the futility of further pursuit of the claim) the system would continuously pass up for appellate scrutiny only those cases that are sufficiently close to the dividing line that reasonable adjudication could go either way.[338]

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[337] Priest & Klein, "The Selection of Disputes for Litigation", 13 J. of Legal Stud. 1 (1984); Priest, "Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes", 14 J. of Legal Stud. 215 (1985); But see Wittman, "Is the Selection of Cases for Trial Biased", 14 J. of Legal Stud. 185 (1985).

In fact, however, our observation of the tiers of review in this context suggests the inapplicability of the Priest formula to SSA disability adjudications. There is simply no reason to be confident that, as the SSA operation is currently structured, it is the particularly close cases that work their way up the appellate hierarchy.

The "open record" aspect of disability cases, already discussed above, is one cause of this -- a case may progressively improve with age, as new data are provided to the adjudicators. Second, the factor of litigation costs, vital to Priest's study of courts, is distorted in this administrative setting. Filing an initial application for disability benefits requires some effort by the claimant, as well as perhaps some badgering of doctors and hospitals to produce copies of needed medical records. Requesting reconsideration, on the other hand, is virtually free in most cases -- just signing an SSA form. The ALJ stage is probably the most costly for the claimant, involving both time and psychic energy to prepare for a hearing, and usually the services of an attorney.[339] The next step, presentation to the Appeals Council, may require a small amount of time from the representative, and nothing from the claimant. Finally, filing in federal court is more difficult for the claimant, and can require a substantial court fee, but the principal hurdle against a civil action is simply the difficulty in finding an attorney who will take the case pro bono or for a contingency fee -- the amount of money or effort the client must devote to discovery, preparation or trial is far less than in most litigation.

Finally, SSA cases are distinct from most court fare studied by Priest in that the agency has so little ability to compromise or settle. Indeed, SSA has virtually no authority for negotiation, and must basically choose to defend its denial of benefits (even if the case against payment of the claim is

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338 Mashaw, supra note 1, at 206, ("The Nagi study [S. Nagi, Disability and Rehabilitation (1970)] also casts light on the problem of "close" cases. . . . [T]hey discovered that the cases they had consigned to the middle categories turned up with equal frequency in awards and denials. This finding tends to confirm the conventional wisdom in the Social Security system that there is an irreducible category of marginal claims that will never be consistently decided.")

339 Attorneys and other representatives who accept fees for services in disability hearings usually do so on a contingency basis, and the claimant does not make any out-of-pocket expenditures that might serve as disincentives to proceed with the case.

imperfect) or abandon its position altogether (even if the claimant ought not to be paid under existing standards.) The stark limitation upon compromise is another factor militating against the operation of the 50% solution.

In short, we are aware of no a priori reason to expect that a 50% award rate -- or any other arbitrarily-chosen figure -- would be "correct" for SSA disability adjudications. The formulae that might suggest such an outcome elsewhere are simply not applicable here. The substantial variation in disability award rates among the various tiers of review is certainly provocative and important, but the statistics themselves cannot be interpreted as conclusive measures of accuracy.

3. The True Costs of Inaccurate Decisions

Even if inaccuracy is difficult to define and measure, we know that it exists. Indeed, we know that its occurrence is inevitable in a system as large as SSA: even if each tier of review were able to avoid substantial error in 90% of its cases, there would still be hundreds or thousands of appeals, many of which would present very bad errors indeed. The gross numbers alone suggest the importance of trying to identify the categories of decisional errors and to locate those who bear the costs.

In a binary categorization system, where claimants are pigeon-holed as "disabled" or "not disabled," there are two possible kinds of errors. Type I errors, false negatives, occur when an eligible individual is improperly denied benefits. Type II errors, false positives, arise when a truly ineligible claimant is wrongly adjudicated as disabled, and benefits are paid. Both types of errors are to be avoided (although, as noted below, the costs of the two types, and the costs of avoiding each, may be asymmetric) but, in disability adjudications as in most similar situations, measures that tend to minimize one type of error will often have the unfortunate side effect of increasing the incidence of the opposite type of error.

Also relevant to the assessment of accuracy is the question of processing costs. As elaborated below, the administrative costs of SSA are substantial, and the overhead costs associated with the disability program are far more expensive than those allocated to the other components of RSDHI. Even at this level, however, processing costs remain relatively low. Mashaw points out that the cost of benefits is roughly 60 times the cost of adjudicating eligibility,[340] suggesting that increases in accuracy are likely to be justifiable on cost effectiveness grounds.

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[340] Mashaw, supra note 1, at 81-82.

a. Costs of False Denials. There are both individual and social costs from failure to provide disability benefits to those who are so incapacitated (as defined by the statute and SSA regulations) that they are lawfully entitled to federal support.

The first such cost is the failure to support those who no longer retain the capacity to support themselves through remunerative activity. Although some of these claimants may have other resources, or other social welfare programs to fall back on, for many disabled people the federal benefits provide the primary means for avoiding abject poverty and the deprivation, discomfort and disease that accompany it.

A second cost of false denials is the psychic dissatisfaction among the truly needy and deserving. These people will know that the system has failed them in a time of greatest need. Moreover, a number of these claimants are seeking RSDHI benefits that they "bought" through compulsory SSA insurance. In essence they are being cheated out of benefits they paid for over a long run of years.

Thirdly, false denials undercut the disability program as an expression of the generosity and good will of the American people. If the system as a whole is inaccurate and unreliable, then the beneficent social purposes of the legislation will be denied, cheapening our self-image as a caring community.

Finally, false denials also hurt the productive members of society, by generating insecurity about their own possible fate, should disability strike them, too. Skepticism about the accuracy of such an important social institution as SSA will inevitably create widespread dissatisfaction.

b. Costs of False Awards. The most obvious cost of an incorrect determination of eligibility is the removal from the work force of a potentially productive worker, and the consequent reduction of tax revenues and GNP. The magnitude of the productivity loss is hard to calculate: particularly for an "almost disabled" worker, and especially in any periods of less than full employment nationwide, the claimant's foregone contribution to the economy may be small.[341]

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[341] SSA does not regularly monitor, or compile statistics about, claimants who are denied (or terminated from) disability benefits, so it is not possible to estimate how many of them may later successfully return to the competitive economy. Anecdotal evidence, however, and a few studies, suggest that those who consider themselves to be sufficiently disabled that they apply for disability benefits are generally unlikely to return to productive work, even if their
(Footnote continued)

Removal of a productive person from the work force also tends to impose hidden, insidious costs upon the recipient of the unwarranted disability benefits. It serves to entrench the person in a disability lifestyle, underscoring a self-image of powerlessness that can degenerate into a life of despondence, immobility and pity that is far less rewarding than maintenance of even marginal employment would be.

False positives also create public dissatisfaction. This tends to bring all of SSA -- indeed, all forms of public social support -- into disrepute, undercutting public sympathy for programs of assistance to the truly needy.

Finally, false positives also impose direct costs upon the intended beneficiaries of the system. In a very real sense, claimants compete with each other for public funds. The greater the aggregate of mistaken awards, the smaller the pool available for distribution among the truly disabled. Given a political climate in which it is -- and is likely to remain -- difficult to increase the total funding for disability programs, a false award imposes an "opportunity cost" of foregone options to pursue other social goals.

In addition, it should be noted that the costs of errors -- both Type I and Type II -- are long-term rather than transitory. That is, once an error is made by the system, it is difficult to remedy. For example, false awards, putting an undeserving claimant on the benefit rolls, may generally be corrected only via a termination action. The experience of the early 1980s, with massive terminations, demonstrated how traumatic that process can be. The revised rules regarding "continuing disability reviews" have accordingly been greatly tempered in response to that experience, and some observers conclude that the new definition of "medical improvement" will make it difficult to remove people from the rolls. Thus, an award of benefits, correct or incorrect, tends to be an action with lifetime consequences.

On the other hand, an erroneous denial is difficult to reverse, too. Even though an improperly denied claimant could simply file a new application, those who "try, try again" may not

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341(continued)
applications for benefits are denied. If they do attempt to work, their wages tend to be low and intermittent. See Bound, "The Health and Earnings of Rejected Disability Insurance Applicants," (Dep't. of Economics, Harvard Univ., Dec. 1985); Linden, "Delays in Processing Benefits to Disability Claimants," 21 Clearinghouse Rev. No. 4, p. 357, 365 (Aug.-Sept. 1987).

be taken quite as seriously. Moreover, unless an adjudicator ruling favorably on the subsequent application takes the unusual action of reopening and revising the earlier denial, there will remain a time period for which benefits are never paid, and in the interim, financial eligibility for RSDHI may expire. To that extent, at least, a false denial carries permanent costs.

4. An Approximation of Accuracy

The difficulty of defining and measuring accuracy with any degree of reliability inclines us toward offering a "second-best" solution, that of skewing the likely errors in a relatively tolerable way.

By "second-best," we do not mean an approximation or compromise with the ideal or perfection. Instead, having concluded that the optimum or "first-best" outcome (perfect accuracy) is unattainable, and that efforts to pursue it directly will result in far worse system performance, we suggest a more modest alternative. Our "second-best" is therefore a restricted optimum, under the constraint that the true optimum is unattainable, as seems to be true in making disability determinations.[342]

We suggest, therefore, two principles: (a) that the SSA adjudicatory system ought to be less concerned with making accurate ultimate decisions in close cases, and more concerned with making accurate decisions early in the process in easy cases; and (b) that the SSA adjudicatory system ought to be more concerned with correcting (or anticipating) false denials than false awards.

a. Focus on Big Errors, Not Small. The first principle, less focus on the marginal cases, springs from the conclusion that it is in these cases that "accuracy" is most elusive and that the costs of error are smallest. In a case close to the dividing line between "disabled" and "not disabled," the most subjectivity is likely to be present and the greatest variability among adjudicators is likely to be shown.

Evidence suggests that the higher levels of the claims review process do not so much "correct errors" of the lower levels but simply "substitute judgment" where they disagree with prior resolution of doubtful cases. Successive review, therefore, does not necessarily produce more accuracy; it may produce a series of disagreements, from different quarters, as to whether the case is marginally on this side or marginally on that side of an important, but largely unverifiable, dividing line.

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[342] The concept of the "second best" was apparently first developed by R.G. Lipsey and K. Lancaster in their studies of macroeconomics and the efforts to attain perfect competition in the marketplace. It has since been borrowed frequently for application in the analysis of a variety of public policy problems. Dictionary of Economics 368 (1972).

Moreover, these close cases are not only the most difficult, they are the least important. A false award of benefits to someone who is almost impaired enough to be eligible is an inexpensive error: the costs of the mistake (foregone productivity, social unhappiness at being cheated, etc.) are likely to be minimized when the claimant's greatest possible contribution to the work force would be low in any event. Similarly, a false denial in a close case (the person is only barely eligible, and almost capable of performing substantial gainful activity) is less expensive than a false denial in an extreme case (where the wrongful withholding of benefits leads to economic deprivation of the individual and to greater distress on the part of society.)

Even though errors in close cases are less socially expensive, they are no less time-consuming for SSA and the claimant. All error cases progress through the same step-by-step administrative hierarchy of the appellate ladder, with blatant errors receiving no expedited treatment. A great deal could be accomplished, all observers agree, if accurate decisions, particularly accurate awards, could be made earlier in the process. This would reduce the claimant's delay in receiving payment and also scale back the volume of traffic presented for subsequent review.

We conclude, therefore, that an element in a second-best solution to the problem of accuracy should be greater emphasis upon the early adjudication, especially where awards can be granted, even at the expense of finely-honed review at later stages. Although this later review may effectively change the outcomes in many cases, it has less of a true claim to "accuracy" -- close cases do not benefit much by such multiple observation.

Thus, reform of the disability adjudication system ought to attempt to deal with the problem of inaccuracy by pre-empting errors at the earliest source, trying to ensure that DDSs make more accurate decisions, so fewer errors -- or at least fewer egregious errors -- are passed along to ALJs, the Appeals Council, and the federal courts.

Enhancing the work of DDSs, and improving the record of early accuracy, will require devoting additional resources to the initial stages of the case evaluation ladder. As elaborated below, we recomend that the Appeals Council be a leader in this effort, taking as its central mission the emendation of the system's ability to make more timely, more accurate, decisions.

b. Focus on Denials, Not Awards. A similar analysis leads us to suggest that erroneous denials in close cases are more problematic than erroneous awards. We note above that errors of both types (false awards as well as false denials) are costly, and that the pricetag of either type of deviation is difficult to quantify. Nevertheless, our observation of the operation of the disability programs, and our sense of the various social and individual costs, convince us that the burdens of mistakes are not symmetric, and that the system ought therefore to "tilt" toward closer inspection of marginal denials rather than marginal awards.

Given the strictness of the statutory standard of disability, individuals who are even close to the eligibility criteria may have little to contribute to the economy and (absent effective rehabilitation) little prospect of future enhancement. Their withdrawal from the labor force is least likely to occasion protest from colleagues who might feel "taken advantage of" by an undeserving freeloader. Moreover, the primary financial cost of erroneous denial falls upon an individual who is least able to bear the burden, while the primary financial cost of an erroneous award is felt by an insurance program which is created precisely to pool risks and spread them over all participants in the plan.

Graph 1 therefore illustrates our second-best solution to decisional accuracy and the preferred allocation of error costs. In it, the 0 point along the axis represents perfect decisional accuracy; to the left are false denials and to the right are false awards. The total social cost of errors is given by the area between the curve (A-F) and the axis.[343]

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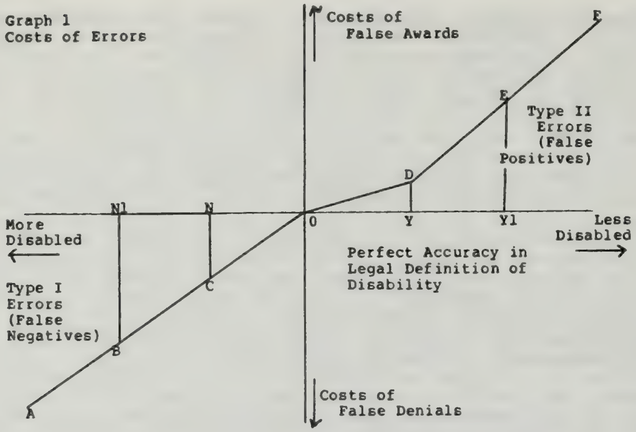
[343] Our chart is an adaptation of that presented in Mashaw, supra note 1, at 83. Mashaw, however, wrote that "My reading of the history of the disability program, analysis of its procedural and evidentiary rules, and observations of its operations reveal no strong reasons to believe that either type of error should be viewed as systematically more costly than the other." Id at 85. In his chart, therefore, the cost curve (A-F) is a straight line, without a kink to the right of the 0 point. See also Mashaw, "How Much of What Quality? A Comment on Conscientious Procedural Design," 65 Cornell L. Rev. 823 (1980); Chassman & Rolston, supra note 1, passim (primary emphasis for OHA quality assurance error correction efforts should be on allowance cases.)



Graph 1
Costs of Errors

Critical to our analysis is the relatively lower slope of the cost line to the immediate right of 0. That is, even though N (no benefits) and Y (yes benefits) are equidistant from the statutory standard, the cost of false denials in the O-Y-D triangle is lower than the cost of false awards in area O-N-C. Conversely, the benefit from correcting or avoiding a number of false awards is less than the benefit from eliminating the corresponding range of false denials, and the system ought to target the costly mistakes.

On our chart, the slopes of the next segments of the social cost curve (DEF and CBA) are equal, suggesting that the marginal benefit of correcting severe errors should be roughly equivalent. That is, major deviations in either direction (wrongly awarding benefits to someone clearly ineligible or wrongly withholding benefits from someone obviously entitled) are more costly, and we have no reason to believe that either type is particularly more common or more expensive than the other.

Thus, in our second-best analysis, the "accuracy" function of the Appeals Council would not be primarily to screen individual cases for yet another detailed parsing of a close factual record. If that type of operation promotes accuracy at all, it does so only slowly and at high cost; more importantly it most often provides "second guessing" rather than error corrections.

The true accuracy function of a sophisticated review apparatus ought to be to try to help devise a system that avoids or corrects errors -- especially wrongful denials of benefits to eligible claimants -- and does so at the earliest practical point in the system.

C. Policy Integrity

Having eschewed any major role in policy formulation, and confronting the definitional problems inherent in any focus on "accuracy," the Appeals Council today attempts to serve a major role in promoting system-wide uniformity, ensuring that the disability law is implemented as it should be by all decisionmakers nationwide. We have identified two related but severable aspects of uniformity, worthy of separate discussion: this subsection addresses the goal of "policy integrity"; the next elaborates on "consistency."

Policy integrity means simply that the applicable law is adhered to, that the lawfully-authorized controllers of the system are able to carry out their management and policymaking functions effectively, free from disruption by untrammeled mavericks.[344]

Policy integrity is important to any public institution in a democracy -- the rule of law requires fidelity to recognized authority -- and it is nowhere more important than in the Social Security Administration, which manages a public largess of such profound social significance.

Because the statutory framework for the disability program is so sketchy, the need for administrative promulgation of implementing regulations has been immense. Although these regulations are, of course, confined in scope by the legislation, there is an unusually broad range of discretionary power, and a vista of policy alternatives which the elected officials and their designees may pursue. It is through these devices that the political element, the Secretary of HHS, finds legitimate expression and control.

One important function of responsible leadership, therefore, is to ensure the maintenance of the internal law of the system --

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[344] See D. Dworkin, Law's Empire 243 (1986) ("Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.")

to oversee and enforce compliance with legally-ordained policies and procedures.

The Appeals Council is admirably well-suited and well-situated to serve a major role in promoting policy integrity. The Appeals Council is the only unit of SSA which regularly receives and adjudicates a broad run of ordinary and extraordinary cases -- it is free to draw on all demographic cohorts of claimants. It sees cases that have been processed by the entire administrative bureaucracy as well as cases that are remanded from courts. It brings together, in a few hands, the disparate outpouring of numerous lower (and higher) decisionmaking units, and can assess them for fidelity to articulated law and policy.

The Appeals Council earns relatively high marks for its policy integrity role. The current members of the Appeals Council are exceptionally well-versed in the applicable law and SSA policy, and show no hesitancy in implementing them. The Appeals Council has succeeded in identifying aberrant behaviors in many cases, and has remanded those cases to ALJs or DDSs with correcting instructions. The Appeals Council as a whole seems comfortable with its role as "police officer" for the system -- spotting deviations from established law and correcting or remanding for more faithful compliance.

In four areas, however, the policy integrity role has become problematic. Three of these are generally beyond the scope of this study, but the fourth goes to the heart of the structure and role of the Appeals Council as an institution.

1. Promulgation of Law

The first such troublesome area concerns the variety of devices for propounding Social Security law and policy. As previously mentioned, SSA has relied upon APA notice-and-comment rulemaking, informal "Social Security Rulings," and an array of evanescent internal policy statements, circulars and manuals.

The status and function of the regulations is clear: they are black-letter law, binding upon all levels of adjudication, including federal courts, unless found to be arbitrary or improperly promulgated. They attain a powerful legitimacy through the democratic process, both the appointment of politically accountable officials and the solicitation and consideration of public participation in rulemaking. Regulations must be responsive to public views and the agency must demonstrate its careful consideration of all meaningful comment even while it retains the discretion to exercise policy.

Rulings, on the other hand (and, *a fortiori*, the internal policy guidelines that are even less publicized or disseminated), are not as prominent or as susceptible to public participation.

They are also not binding upon reviewing courts. The controversy persists, however, as to their efficacy within the SSA system: the SSRs proclaim themselves to be binding on all levels of adjudication, and customary principles of administrative law support this status for an agency's interpretative statements, yet many ALJs have systematically maintained that they are bound only by formal regulations, not unilateral SSRs.

It is beyond the scope of this study to attempt to reconcile this difference, or even to recommend practices to circumvent it. The balance among factors such as legal dignity, speed, flexibility, publicity, etc., is a difficult one. All we can say is that as long as this conflict endures, with ALJs insisting that they may overlook policy documents that SSA insists with equal vigor are binding, then the Appeals Council's role in ensuring policy integrity inside the Social Security system will be incomplete and frequently frustrated.

2. Non-acquiescence

A similar factor, cited by many observers and participants, has been the problematic nature of SSA's approach to decisions of the federal circuits. Again, the recent changes in SSA's acquiesence practices may have largely mooted this controversy,[345] and it is beyond our mandate to address it directly, but we must observe the occasional consternation it has generated inside SSA and the difficulties it has posed for the Appeals Council's attempts to achieve policy integrity.

Put simply, when the law is in disarray, when the policies of different legal authorities are not well-integrated, then obviously the Appeals Council's power to impose order upon the internal mechanisms of the bureaucracy will be starkly limited.

3. Discipline

In a system as large as the SSA claims adjudication hierarchy, one must anticipate a spectrum of capabilities, interests and efforts. Just as there are some tremendously capable ALJs, there are some who regularly mangle the cases and flout SSA procedures. Similarly, state DDSs exhibit a wide range of competence and fidelity to central direction.

At this time, many observers conclude that SSA's ability to exercise control over deviant sub-units is starkly limited. The major sanctions -- e.g., action against an ALJ through the Merit Systems Protection Board, federalizing the functions of a DDS -- are so cumbersome and expensive that they hardly serve as effective deterrents.

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[345] SSA and Department of Justice decisions about which cases to appeal, and which to accept, however, remain problematic, sustaining many of the same questions and concerns as did the prior policy of non-acquiesence.

Other observers, however, conclude that independence, especially for ALJs, is a virtue of the system, or that it is at least a price worth paying to preserve integrity and the appearance of propriety. Too much SSA authority to discipline lower level decisionmakers, they argue, might permit abuse.

For present purposes, our only conclusion in this area is again a note of caution: the independence accorded to ALJs and, to a lesser extent, DDSs, carries both costs and benefits. The obvious advantage is in enhanced opportunity for creativity and autonomy; the obvious cost is in reduced opportunities for the Appeals Council (or anyone else in SSA) to achieve program integrity.

4. Balancing Flexibility and Order

The virtues of policy integrity should not obscure the complementary virtues of flexibility and innovation.[346] A sound mass justice process must allow for some individualizing discretion.[347] This bureaucratic elbow room allows the implementing decisionmakers, the "street-level bureaucrats,"[348] the space to make particularized adjustments in the rules. It adds adaptability and sensitivity to the legal exactitude of the administrative process.[349]

Consciously and inevitably, SSA has provided such space, or discretion, in its rule structure. No system of rules could be so tightly drawn to foreclose this discretion, and a disability determination system in particular forecloses a mechanistic approach.

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[346] Mashaw, supra note 1, at 121-22; Davis, supra note 1, at 17 ("Even when rules can be written, discretion is often better.")

[347] Koch supra note 2, at 9.22[2].

[348] This phrase was coined by M. Lipsky in Street-Level Bureaucracy: The Dilemma of the Individual in Public Service (1980).

[349] Mashaw, supra note 1, at 108 ("The error costs from overgeneralization may here outweigh the gains from error avoidance. The adjudicator's feel for this type of case may often be better than any rule.")

The key questions are who in the adjudicatory bureaucracy should be primarily responsible for exercising this discretion, and what role should the Appeals Council play in fostering innovation and experimentation?

We are mindful of the importance of nationwide consistency in the federal disability programs, but we conclude that both the DDSs and the ALJs should be licensed to do more creative thinking, more experimentation with different systems for organizing and processing the cases, and more interstitial policy articulation. Particularly at the ALJ stage, where highly competent and experienced adjudicators review a large number of cases, there ought to be adequate scope for individualizing judgments not fully covered by existing rules. The discretion for handling the disability caseload in potentially improved ways is valuable and rare, and should be exercised more frequently.

As we develop further in the next section, the function of the Appeals Council with respect to this discretion should be twofold. First, the Appeals Council should ensure that the fundamental guaranties of due process are adhered to -- claimants should not be arbitrarily disadvantaged in the name of casual experimentation. The individualizing discretion of the ALJ should remain within the boundaries permitted by existing law, and the Appeals Council must be responsible for monitoring continued compliance.[350]

Second, the Appeals Council should be responsible for evaluating the success of these discretionary actions and, where appropriate, for publicizing their results and disseminating the successful techniques. The Appeals Council's perspective permits it to undertake comparisons across the range of DDSs and ALJs, and it should help infuse successful innovations into new localities.

We conclude, therefore, that the Appeals Council should not merely correct errors, attempting to eliminate individual mistakes in the cases; it should also play a more positive, outgoing role in fostering system-wide improvements and in identifying and exploring potential areas of innovation and discretion.

D. Consistency

Related to the goal of promoting policy integrity is the Appeals Council's role in attaining decisional consistency: ensuring that like cases are treated alike. Again, this is already widely taken as an important function of the Appeals

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[350] Koch, "Judicial Review of Administrative Discretion", 54 Geo. Wash. L. Rev. 469, 471-78 (1986).

Council as currently constituted and, again, we have found both notable success and shortcomings in the present level of performance.

Consistency, of course, relates to the fundamental fairness of the mass justice system. It implies a respect for the individual claimant, and a guaranty that the benefit system is above political or other partisan manipulation. It is also a reflection that SSA, as a national program, ought to mean the same thing to claimants wherever they are situated -- disability is a nationwide problem and the remedial effort ought to be of nationwide applicability.

Finally, the goal of consistency has special relevance in a program in which true accuracy remains elusive. That is, if we are unable to measure, or even to define, the "correctness" of an adjudication, we may nonetheless be able to appraise its "similarity" to other comparable cases. That the same mistake, as it were, should be repeatedly made in like cases is not perfection, but it is fair -- and it may be the most that is attainable in a second-best world.

1. Types of Consistency

It is worth noting at the outset that two different dimensions of consistency may be discerned. "Vertical consistency" is achieved when a case is evaluated in the same fashion, and pursuant to the same legal standards, at each succeeding tier of the appellate review ladder. It requires harmony among DDS, ALJ, Appeals Council and federal court regarding the standards for case handling, the definitions of eligibility and interpretations of policy.

"Horizontal consistency" refers to similarity of decisionmaking at different geographic locales. In a national program such as SSA, claimants in Michigan, Georgia and New Mexico ought to receive identical treatment from their local DDS, identical hearing procedures before their ALJ and, if their cases are substantially the same, identical outcomes on their applications.

In short, the same law ought to be applied vertically inside the several tiers of the bureaucracy and horizontally within each stratum.

In fact, however, the data reveal wide variations along both dimensions. Vertical inconsistency is the harder to evaluate -- as noted, there may be many reasons (including important ongoing evolution in the case itself) why reconsideration, ALJ hearing, Appeals Council review and federal court action result in such widely divergent award rates. For example, as long as the ALJ remains the only adjudicator to confront the claimant face-to-face, the system should expect many reversals at that tier.[351]

Other explanations of vertical inconsistency, however, are less benign. The DDSs, for example, have operated under noticeably different law than the ALJs -- not just procedural differences, but substantive directives such as instruction to adhere only to the Listings (or only to certain of the Listings) at the expense of the grids. The 1982 Bellmon Report, too, strongly suggested that "where you stand depends on where you sit" -- that a case would be resolved differently by adjudicators at different levels, even when they were presented with identical case files.

Horizontal inconsistency is even more manifest and alarming.[352] The award rates among DDSs continue to vary widely from state to state, as they have done virtually since the inception of the disability program. The ALJs, too, are disparate -- many observers note with concern that certain ALJs award benefits in only one-quarter of the cases presented to them, while others consistently find eligibility in three-quarters of the claimants.

This inconsistency is in part created from the top of the hierarchy, as different federal courts evolve different rules in cases brought to their respective jurisdictions. More of the variability, however, flows from the bottom up, as different locales generate starkly different success ratios for their claimants. The illusion of national uniformity in SSA adjudication has never been consonant with reality, and there is little indication of any ongoing improvement.

2. Role of the Appeals Council

The Appeals Council should be uniquely capable of participating in the endeavor to attain consistency. Although there are some 1300 SSA district offices, almost 700 ALJs and 900 federal district judges, there is but one Appeals Council. It is the one place in the claims bureaucracy where cases from all regions, cases which have traversed all adjudicatory tiers, are brought and adjudicated together.

The Appeals Council is already well aware of its unique perch, and the members take seriously the responsibility for maintaining the nationwide scope of the program. If the statistics do not bespeak much success to date in creating national consistency, one can only speculate how much worse the portrait would be if there had been no single entity at the top of the pyramid attempting to reconcile divergent views.

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[351] Cofer, supra note 1, at 170; 1986 Hearing, supra note 1, at 28, Statement of Eileen P. Sweeney, Staff Attorney, National Senior Citizens Law Center.

[352] National Center study, supra note 1, at xxi ("The inconsistency of the disability decision process is patent."); Capowski, supra note 64, at 343.

This is not to say that the Appeals Council itself is a paragon of uniformity. Indeed, with a current membership of 20, the Council may already be too large to be able to speak with one voice. The current case handling routines further underscore a dispersion -- a case is ordinarily assigned to only one or two members; only rarely do as many as three members confer upon a case; and virtually never will more than three members address a matter together.

Moreover, as far as we could ascertain, Council-wide discussion of shared problems remains quite rare. Plenary meetings are held approximately monthly, but very little of this time is devoted to working out common approaches or strategies. The members' regional groupings could be a source of some nascent uniformity, but they are not much used for this purpose. Members told us of daily consultation with each other to discuss novel or tricky issues, but we were not persuaded that this collegiality was able to produce very much by way of a shared outlook. And we observe, although the statistics are difficult to marshal, that members do differ in their products, with some, for example, granting review of cases at least twice as often as others do.[353]

In short, the Appeals Council, potentially the best locus in the network for attaining consistency, still operates much like an atomized collection of individuals, not like a true national entity.[354]

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[353] As far back as 1940, the Social Security Board recognized the importance of collegiality among the members of the Appeals Council: "To set up such a Council may seem a somewhat expensive means of conducting the hearing and review system. The review of cases and their just decision requires qualities of a high order, however, and their review is likely to be better than the initial decision which is adequate in the great bulk of cases only if several minds collaborate in the process." Basic Provisions, supra note 185, at 38.

[354] A decade or so ago, there were proposals (partially implemented at that time, but just as quickly abandoned) to "regionalize" the Appeals Council by breaking its members into district groups that would physically sit in various regional headquarters and handle cases on-site. We would

(Footnote continued)

3. Impediments to Consistency

Assessment of the Appeals Council's opportunities for promoting uniform decisionmaking begins with a recognition of two rather distinct types of consistency: procedural and substantive. The first, fidelity to optimal procedures, is relatively easier for the Appeals Council to pursue. It is less problematic for a central reviewing body to insist that ALJs and DDSs adhere to an established sequence of steps in developing and evaluating claims. The accumulation of needed medical records; the taking of testimony, where appropriate, from medical or vocational advisors; the proper elaboration of allegations of mental impairment; and the step-by-step working through of the sequential evaluation process are all fundamental steps that the Appeals Council can monitor in a straightforward fashion for national consistency. There is little reason why these steps should vary according to the claimant's geography, and there is little danger that important guaranties about decisional independence would be jeopardized by insistence upon standardized procedures.

However, substantive consistency -- the attempt to ensure that like cases are ultimately resolved alike -- is far more problematic. Any attempt to harmonize the decisional output of ALJs inevitably raises fundamental concerns about compromising the APA protections so necessary to their integrity. There is little that any tier of SSA could or should do to enforce directly a substantive uniformity upon ALJs -- the danger of manipulation or apparent manipulation is too great.

Recent history, as well as sound theory of administrative law, suggest that any reforms perceived as challenges to ALJ autonomy will be fiercely resisted. SSA should never return to being "at war with itself," and OHA in particular can not sustain the kinds of tension and resentment that to some extent still characterize relations among ALJs, Appeals Council and policy officials.

4. Techniques for Improving Consistency

354(continued) not support that type of compartmentalization, preferring instead greater integration of the Appeals Council as a national entity. The fact that regionalization could be so seriously considered is itself an indicator of the lack of cohesion among the Council, the absence of a sense that members might act as a self-conscious, integrated group striving together to help pursue national consistency in the programs.

We conclude, therefore, that perfect consistency can never be attained. ALJs will continue to vary and will continue to assert their independence. The Appeals Council should not challenge this reality, but should recognize, even endorse it, as part of the price inevitably to be paid for the benefit of an independent quasi-judicial corps. The range of reversal rates is greater than it should be, but any direct assault on the problem is bound to be futile and destructive.

Instead, there are several other steps -- less overt, less contentious, but perhaps ultimately more successful -- that the Appeals Council may be able to adopt in pursuit of greater consistency.

One such measure begins, as do many of our other recommendations, with the Appeals Council re-asserting control over its own docket. Only when the Appeals Council is able to exercise some greater selectivity in the cases it sees will it be able to play a more important role in pursuing consistency. As elaborated in the final section of our report, we propose that SSA develop mechanisms for bringing far fewer cases before the Appeals Council, while ensuring that the categories of cases to be reviewed are, in some sense, those most likely to contain errors, those which would benefit most from systematic scrutiny, or those for which inconsistency has been the greatest problem.

Once the caseload is reduced, the Appeals Council could take other steps in pursuit of program consistency. The Appeals Council could write better decisions -- opinions which are not simply conclusory boilerplate, but which analyze the evidence and the arguments with care, and explain in some detail why the Appeals Council is taking the action it does. The Appeals Council's decisions today do not contain this elaboration and are therefore not especially compelling in their logic or citation, nor very likely to inspire consistency among the lower levels.

In this context, it is disturbing that the Appeals Council does not do more to publicize and disseminate its decisions. It is ignoring an opportunity to pursue consistency through the promulgation of more of its most significant decisions, together with an appropriate index. Consistency is difficult to attain solely on a case-by-case basis; ALJs and DDSs require in addition some more systematic guidance, and the Appeals Council could promote consistency by advertising within all tiers of the system, the proper (and improper) ways of handling particular types of claims. Today, the absence of any effective feedback mechanism is striking -- ALJs and DDSs do not regularly track the progress of their cases, and do not have the opportunity of learning through appellate identification of errors. Unless some happenstance brings a remanded case back to the same ALJ or DDS who acted on it initially, there is no effective mechanism for the Appeals Council to have a broader impact on national consistency, instead of merely correcting the particular case at bar.

Aside from feedback via case handling, other potential devices that could serve a role in enhancing consistency are currently underutilized. There is, for example, precious little interaction now between ALJs and Appeals Council members: the Appeals Council has virtually no budget for travel to local hearing offices, and the visiting ALJ program (under which ALJs were regularly assigned for one-month temporary duty stints as Appeals Council members) has been terminated. There has, moreover, been little recent activity in training or in continuing legal (or medical) education that might bring ALJs and members together.

Similarly, most Appeals Council members have virtually no contact with DDS or district office personnel on any regular basis. Very little has been done to explore ways in which direct meetings among personnel from the various tiers of review could be arranged to enhance better understanding of the program and, hence, consistency in its application.

E. Efficient Government

In a program that costs millions of dollars to administer, cost effectiveness cannot be ignored. The Appeals Council has a role to play in assuring efficiency in its own process and that of the entire system.

1. Cost Effectiveness in General

Once again, the size of SSA's disability operation is staggering: over two million initial applications are processed each year; over one million appellate reviews are conducted; the number of beneficiaries in current pay status has reached seven million; and the volume of discrete facts found, laws construed, and regulations implemented is incalculable.

Many of the cases, moreover, involve highly complex matters of medicine and science; whether by choice or by the pressure of events, SSA has been near the cutting edge of modern developments in psychiatric impairments, pain, and AIDS, to name a few.

All of this is accomplished on a budget of about $650 million for administration of the disability portion of RSDHI. SSA calculates that the costs of administering the disability provisions of the law is 3.4% of annual income -- a figure that may seem modest, but is also four times the corresponding figure for the administration of the retirement and survivors portions of RSDHI, where the intricacies of disability determination are not at play.[355]

Mashaw estimated some years ago that the average cost of a disability determination was about $500 and the lump sum value of an award was about $30,000, generating a figure for processing costs that is only one sixtieth of the total cost.[356] We suspect that this ratio has, if anything, become even more favorable over the ensuing years, as benefit levels rise faster than overhead costs.[357]

This apparent efficiency, however, does not imply that SSA can be indifferent to costs -- indeed, the substantial downsizing of the agency's manpower pool (projected to shrink from 74,600 permanent staff in 1983 to 66,700 in 1987) demonstrates that productivity remains highly prized.

Moreover, a 60:1 ratio does not, by itself, translate into a finding that any greater spending on administrative processing would necessarily be cost efficient. That is, the value of an "accurate" disability decision (if one could be defined) is not the full $30,000 -- it is, rather, the difference in aggregate social utility between having those funds in the hands of taxpayers or in the hands of a proper disability recipient. A correct decision is valuable, but it is not worth anywhere near the full sum of the payments.

Focusing on the Appeals Council, the question is whether this fourth tier of administrative decisionmaking is worth its particular cost. The Appeals Council, as it currently operates, changes the result in only about 5% of the cases delivered to it, and remands for further action perhaps another 10%. This is far from a trivial contribution -- on an annual Appeals Council docket of 50,000 cases, it means that 7500 cases receive some substantial alteration. But the Appeals Council (and its affiliated support unit, the Office of Appeals Operations) also consume substantial SSA resources: almost $32 million per year, and several hundred relatively high-graded people.

Moreover, the timeliness cost of the Appeals Council is

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355 SSA 1987 Annual Report, supra note 11, at 30. These figures exclude the costs of administering the SSI disability program for which general revenues, rather than the SSA trust funds, are tapped.

356 Mashaw, supra note 1, at 81-82.

357 HHS has calculated that the present value of the average costs asociated with a newly entitled disabled worker were $66,800 in December, 1985, including approximately $39,000 in direct payments of benefits, $4800 in benefits to dependents, and $20,700 in Medicare benefits. Wilkin, supra note 87, at 4.

substantial: even if the system improves to the point where all request-for-review cases are disposed of within 90 days, the claimant is still forced to wait that three months, with very little expectation of any favorable action. Appeals Council reopenings, moreover, can substantially delay administrative finality, prolonging the wait for access to court.

2. Sources of Inefficiency

Although it is precariously difficult to assign rigorous costs and benefits inside a complex organizational structure such as SSA, or a subunit such as the Appeals Council, we were able to identify a number of areas of waste or inefficiency, which prevent the Appeals Council from achieving optimal levels of productivity.

The first such stumbling block is the Appeals Council's current "system" for processing words and data, for tracking files, and for compiling statistics. The computer hardware, software and support services are at best primitive; the technological revolution seems essentially to have missed the Office of Hearings and Appeals.[358]

Members cannot, for example, directly make any changes or corrections in letters or decisions that go out over their signatures -- even typographical errors require returning the entire file to OAO for time-consuming reprocessing. The Appeals Council, moreover, has only a rudimentary statistical base -- the categories for recording various types of case actions are anomalous and poorly understood. Even the telephone system is a relic.

The kindest conclusion one could draw from exposure to the Appeals Council's stunted computational capacity is that the situation must have been far worse only a few months ago when even the current equipment was unavailable. The promise of better systems, including computer integration with SSA headquarters, always looms on the horizon, but we suspect that meaningful relief will not arrive soon, without outside pressures.

Another major source of inefficiency is the Appeals Council members' lack of personal staff support. When cases arrive at the Appeals Council from OAO, there is no one to pre-screen them for the member, to sort the pedestrian from the significant. The members are thus forced to spend too much time on purely ministerial duties, distracting them from the ability to serve a more reflective, sophisticated function. Members thus wind up doubling as their own clerks, hardly an efficient use of their talents.

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[358] Despite representations that the Appeals Council's word processing equipment would be at the technological "state of the art," Testimony of Louis B. Hays, Associate Commissioner for Hearings and Appeals, 1983 Hearing, supra note 1, at 24, OHA has, in fact, supplied the Appeals Council with only an inadequate volume of obsolescent hardware.

In a related matter, we observed considerable cost in the organization and location of OAO analysts. They are spread through a number of buildings, making communications and simple file transfers cumbersome. The OAO branches, moreover, do not parallel the members' geographic groupings, yielding a situation in which an analyst might send cases to a large number of different members (so the analyst never really learns any member's particular style and preferences) and each member may conversely receive work from 30 analysts (preventing members from learning in detail the strengths and weaknesses of the individuals whose work they review and rely upon.)[359]

3. Protecting Judicial Resources

A consistent justification for the existence of the Appeals Council is its ability to screen cases before they reach the courts, paying more deserving claims administratively and protecting the district judges from what might otherwise become a "flood" of litigation.[360]

The protection of judicial resources is indeed an important value: claimants, SSA and the federal judiciary are all better off if claims can be resolved prior to filing a civil action. And the strain upon federal courts is already substantial: some 20-25% of the federal civil cases filed against the United States are SSA disability contests (although because these cases tend to be resolved expeditiously, they may account for only 2% of the federal courts' actual work.)[361]

The sheer size of the SSA caseload again suggests that even minor perturbations in SSA's rate of resolution of claims could cause major disruptions for a federal judiciary not equipped to handle that volume of traffic. Of the annual 2 million new disability cases, perhaps 10,000 (.5%) will wind up, years later, in court. If SSA were able, for some reason, to dispatch only 99%, instead of 99.5%, of the cases administratively, the burden of federal actions would thus double.

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[359] We understand that SSA is currently undertaking measures to redress this problem, by combining OAO and the Appeals Council under one administrator and by matching one OAO branch with one Appeals Council member.

[360] E.g., Statement of Burton Berkley, Deputy Chair, Appeals Council, Cleveland Transcript, supra note 1, at 274.

[361] Flanders, "What Do the Federal Courts Do? A Research Note", 5 Rev. of Litigation 199, 206 (1986).

The final tier of SSA, the Appeals Council, now receives approximately 50,000 cases per year. Of these, perhaps 10,000 will subsequently result in federal court actions. How much credit can the Appeals Council actually take for this winnowing? How much "protection" of the federal docket is provided by the action of the Appeals Council, and how much is more properly attributable to other factors?

We conclude that the Appeals Council itself now contributes relatively little to this function. It does, to be sure, pay a number of claims, and remand another fraction to ALJs who may yet rule in favor of the claimant. But the Appeals Council itself does precious little to "satisfy" denied claimants or persuade them not to press further. The Appeals Council decisions are so standardized and non-responsive that they "convince" no one; the review proceedings before the Appeals Council are so opaque that no one could be placated by this as a day in court.

The real deterrent to court action -- the real force protecting the federal courts against a flood of claimants -- is not the Appeals Council, but the cost, cumbersomeness and delay of federal litigation. Typically, the claimant must find a representative willing to invest time and money pro bono or for a contingency fee; must endure long uncertainty (during which time no benefits are paid); and must realize that even if the court is sympathetic, a remand for a new hearing, rather than an outright award of benefits, is the most likely outcome. We conclude that all these factors would operate just as powerfully even if there were no Appeals Council posing as a guard at the courthouse door.

There is one mechanism through which the Appeals Council does directly reduce the volume of cases going to court, but it is a factor from which none can take solace. Sometimes the Appeals Council, with all its delays and impassivity, does succeed in exhausting claimants -- not in persuading them that the claims are without merit, but in engendering a cynical sense of defeat, that the vast bureaucracy just isn't worth fighting any more. This process does, in fact, help keep cases out of court, but it does so only at an intolerable price of justice denied.

F. Acceptability

Acceptability among, and support from, a variety of constituencies is an important value for an organization like SSA. A level of public confidence is necessary to the performance of its primary missions; Congressional support is essential for continued institutional survival; and the reputation for fairness and competence among other politically relevant groups is important to the agency's operations.

As the pinnacle of the SSA adjudicatory bureaucracy, the Appeals Council can play a major role in fostering greater acceptability of the program, and it can play this role in a variety of ways with different audiences. Unfortunately, we conclude that the Appeals Council to date has either ignored this responsibility altogether, or actually aggravated existing poor public appraisals of SSA.

1. Satisfaction Among Claimants and Their Representatives

The most direct -- and the most difficult -- target for building greater acceptability is the group of disability claimants and their representatives who are personally served by SSA and the Appeals Council. These are the bureaucracy's "customers," and their satisfaction is an important element of a mass justice system.[362]

Obviously, those who lose -- who are denied the benefits they claim -- are going to experience a certain level of dissatisfaction no matter how much care and sensitivity the system exhibits. Because not every claimant is entitled to benefits, and because the agency's responsibility is to make choices -- often difficult, close choices -- among claimants who ordinarily do have some significant handicaps, there will inevitably be a cadre of disappointed litigants.

Moreover, it is predictable that a program as large as SSA, even if operated in the best faith with the most modern management tools, will make some mistakes, including some quite egregious ones. Even if the error rate is statistically low, the absolute number of mistaken denials -- and the incidents of callous or ignorant bureaucratic treatment -- will be significant.

Even discounting these inherent problems, however, the degree of claimant satisfaction with SSA and the Appeals Council is low. People are able to distinguish between being denied and being badly treated by the system, and people are often able to maintain respect for an organization, even after it rejects their requests, if they feel it is fundamentally fair. In the case of the Appeals Council, however, claimants and their representatives frequently express two critical areas of dissatisfaction.

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[362] *See generally*, J. Mashaw, *Due Process in the Administrative State* (1985). An emerging school of thought, which he labels as proponents of a "dignitary theory" has as its "unifying thread . . . the belief that the ways in which legal processes define participants and regulate participation, not just the rationality of the substantive results, must be considered when judging the legitimacy of public decision making." *Id.* at 161-62.

The first source of unhappiness concerns delay.[363] The Appeals Council simply takes too long to affect too few cases. In request-for-review situations, the Appeals Council is perceived as simply a way-station, a tedious process that must be traversed, even though the prospect for relief is small, in order for the claimant to progress to federal court where the chances for victory are greater.

In own-motion review situations, claimants again see the Appeals Council as a cause of delay, postponing the effectuation of an ALJ award, or -- even worse -- as a threat to benefits won at the ALJ level.[364]

In court cases, too, the Appeals Council is seen as largely a source of unwarranted delay, or worse. By pulling weak cases back from court on a Secretary's motion for remand, the Appeals Council is often interpreted as functioning to strengthen the case for denial, rather than paying the claim -- covering up, rather than redressing, ALJ errors.

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[363] Of course, the Appeals Council is hardly responsible for all the delays that mark the Social Security system; it is merely the latest administrative source of delay. See 1986 Hearing, supra note 1, at 25-26, Statement of Arthur S. Flemming, CoChair, Save Our Security Coalition, ("In evaluating the impact of the delays at the Appeals Council level, it is important to recognize that this appeal is the last step within the agency in an appeal procedure which may have already lasted well over a year, possibly even 2 years in some cases."); Linden, supra note 341, at 357 (summarizing results of court-ordered study conducted by SSA regarding processing times for current and retroactive payments.)

[364] It is worth noting that in our interviews with claimants' representatives, when we asked about their impressions of the current work of the Appeals Council, the nearly unanimous response suggested an impression that own-motion review, which might result in reversal of an ALJ award, was a major (if not the major) portion of the workload. In fact, statistically, OHA now receives only a small number of own-motion cases (perhaps 300-400 per month) and the Appeals Council grants review in an almost de minimus number (perhaps 60-80 per month). The fact that even well-informed claimants' representatives are so out-of-date in their understanding of the current operation of the Appeals Council is itself an indication of a poor job in promoting acceptability.)

Finally, even when the Appeals Council does take cognizance of a case, it is twice as likely to remand as to reverse, meaning that subsequent proceedings before an ALJ -- entailing more delay and perhaps another full hearing -- are the likely outcome.

Recent statistics do suggest a somewhat better timeliness performance on the part of the Appeals Council. At the least, the delays do not seem to be getting worse, and the incidence of lost files is decreasing. Management reforms, however, can go only a small part of the way toward reconciling the inherent delays in a system for coping with the Appeals Council's current volume of cases.

The second major complaint that claimants and their representatives assert about the Appeals Council concerns the remoteness and the impersonality of the process.

Claimants never see an Appeals Council member or OAO analyst. Even high-volume representatives, who deal with the institution repeatedly, report little or no human contact at any stage of the case handling. The unanimous impression is that the Appeals Council is distant, aloof, and impassive. Representatives confess that they don't know much about, or even care much about, the Appeals Council -- it is so arcane that they rarely take it seriously.

This sense of the Appeals Council as a "black box," the internal composition and operation of which are kept mysterious, generates an apprehension of arbitrariness -- no one knows why the Appeals Council acts as it does, and each representative can relate anecdotes about egregious ALJ errors that were blithely overlooked by the Appeals Council as well as weak, almost casual requests for review that were granted.

No claimant ever feels that he or she has "had a day in court" before the Appeals Council. Few could feel satisfied that the case was fairly heard and carefully scrutinized. Few -- regardless of the outcome of the cases -- come away from the encounter with the Appeals Council feeling that their dignity as claimants has been acknowledged and respected by the process.

Partly this sense of remoteness is due to the fact that representation before the Appeals Council is entirely on paper, with no possibility of an oral appearance. Partly it is due to the curt nature of the Appeals Council's mailed notifications and decisional documents. Partly it is due to the restraint the Appeals Council has imposed upon itself regarding travel or public appearances -- with a few notable exceptions by the Deputy Chair, members of the Appeals Council do not attend conferences, offer workshops, or deliver speeches to groups of claimants representatives.

2. Public Confidence and Support

This "invisibility" of the Appeals Council is even more extreme among the public at large.[365] Few people outside those intimately involved in the disability process have ever heard of the Appeals Council, and we think it only barely an exaggeration to assert that no one, other than people currently or formerly associated with OHA, has even a rudimentary understanding of how the Appeals Council operates.

At a time when public confidence in, and support for, SSA in general seems to be in jeopardy, it is striking how little has been done to utilize the resources of the Appeals Council to redress the problem.

3. Acceptability Among ALJs

Another vital constituency for the Appeals Council is the corps of ALJs, whose decisions it reviews.

The appellate function inherently creates certain tensions -- some degree of antagonism is inevitable between junior and senior tiers on an appellate ladder. Disagreements about particular cases or about implementing practices, however, are unremarkable and for the most part can be handled civilly and collegially.

What we observe, in addition, is a much more profound level of disrespect by ALJs of the Appeals Council as an institution. Even ALJs who have had personal experience with the Appeals Council, and who express respect for the capabilities and sincerity of at least some of the members, have little faith in the organization as a whole.

ALJs complain, first of all, about the fact that Appeals Council members are "merit systems" employees, not APA protected. The ALJs conclude that members are susceptible to political pressures, or that they might feel themselves so subject, and ALJs assert that it is improper for bonus-eligible employees to review quasi-judicial decisions on such fact-intensive cases. ALJs have repeatedly battled the OHA leadership over issues such as productivity and performance ratings, and have argued that their own statutory decisional independence is an essential guaranty of the fairness of the system; they have no truck with less-secure employees in a judicial appellate role.

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[365] Koitz, "Social Security: Legislation to Create an Independent Agency," Issue Brief by Congressional Research Service, 7 (1986); Mashaw, *supra* note 1, at 144 ("It is perhaps the fate of SSA to be misunderstood.")

Secondly, ALJs resent the fact that their decisions are subject to review by members whose qualifications and capabilities are no greater than their own. At the present, the job qualifications for members and ALJs are substantially identical, and OHA has attracted a number of ALJs to join the Appeals Council. But the tradition has not always been so grand: there have been non-lawyers on the Appeals Council in the not-too-distant past (many ALJs appear to think that there still are some) and most members have never had the occasion to attend, let alone to conduct, a real hearing.[366] Since the two jobs are graded and paid at the same level, there is little incentive for the best ALJs to aspire to climb the appellate ladder (unless geographic attractions apply) and we observed more than one current member of the Appeals Council who frankly expressed a preference for an appointment as an ALJ, if one could be arranged for the Washington, DC, or Baltimore areas.

In short, ALJs do not now see the Appeals Council as a legitimate appellate body. They suspect it of political manipulability, and they believe it has been captured by its caseload and forced into over-reliance upon the work of non-lawyer OAO analysts. ALJs have precious little opportunity to interact with Appeals Council members, and little occasion, therefore, to dispel any myths about them. Within OHA, therefore, as among the claimants and general public, there is a genuine problem of Appeals Council acceptability.

4. Confidence Among the Courts

The SSA disability process has been in a period, from which it is perhaps emerging, of considerable judicial distrust. Affirmation rates in court fell to an all-time low, and restraining orders, contempt citations and hostile dicta proliferated.

The Appeals Council, in the midst of all this, was surprisingly unscathed. Indeed, it is noteworthy how frequently the federal courts simply looked past the actions of the Appeals

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[366] The original plan for establishing the Appeals Council envisioned a great degree of fungibility between the members and the hearing examiners: "Members of the Appeals Council will be authorized to serve as referees and should exercise such authority from time to time as a means of keeping them in touch with the problems connected with conducting hearings and developing the records." Basic Provisions, supra note 185, at 39.

Council (formally, the final and reviewable Secretarial action) to dissect the work of the ALJ. Even in the eyes of the reviewing tribunal, the Appeals Council was often deemed irrelevant, as doing little, if anything, to protect or defend the process and the results of the hearing level.

Recently the Appeals Council has attempted to become somewhat more responsive to court activity. It has revised the prior "harmless error" policy, and is now granting review over more ALJ denials, even where the ultimate decision was correct, to re-write the decision so the process and rationale may be more acceptable in court. Similarly, it has streamlined the process for seeking Secretarial remand on selected cases, to provide further administrative work-up on cases difficult to sustain in court.

In fact, there is some danger that the Appeals Council may now be becoming too preoccupied with court actions, at the expense of its other roles in enhancing administrative behavior. That is, institutional resources directed at evaluating and defending particular cases when they go to court are resources that cannot be utilized for improving performance at the lower levels of the bureaucracy in order to minimize errors early in the process.

5. Acceptability with the Congress

SSA is a perennial on Capitol Hill, with the agency's programs -- and the Congress' pursestrings -- rising and falling with the vicissitudes of politics. The clearest prediction we are able to make at this time is that, in an era of deficits and belt-tightening, there is little prospect for success of proposals to spend more money on any domestic program, including disability. The extent to which this is an indicator of "acceptability," however, is more difficult to assess.

OHA has certainly received more than its fair share of scrutiny, being the subject of a variety of reports and hearings in recent years. Most of this attention, however, has been lavished on the ALJ stage, and on the controversies over productivity and reversal rates.

The Appeals Council, on the other hand, has attracted far less notice -- it is no more prominent in the attention of Congressional representatives and staff than among other sectors. Even the most recent sweeping legislative proposals, which would abolish the Appeals Council altogether, do so mostly as an afterthought, or as a side effect of the creation of a new federal Social Security Court.[367]

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[367] See e.g., 1986 Hearing, supra note 1, at 3 (Statement of Rep. Archer).

At a deeper level, even the Congressional staff who know the most about the Appeals Council seem to have little to say in support or opposition. They see it as positioned to perform some potentially valuable institutional functions, but not as being notably successful in carrying out any particular mandate.

Thus, the Appeals Council seems to have little impact with the Congress -- neither generating hostility nor ingratiating itself with supporters -- and can claim little success in fostering greater acceptability for the program as a whole.

IV. Findings and Recommendations

A. Introduction

The Appeals Council is -- or ought to be -- an important institution. It alone has the authority to issue final administrative adjudications, acting in the name of the Secretary of HHS in matters of considerable moment to individual claimants. It alone reviews and adjudicates the thousands of disability cases, as they pour in from ALJs and DDSs around the country, surveying the grand run of decisions that constitute the agency's combined institutional experience. It alone sees the full panoply of court cases, participating in the disability litigation and all its antecedents in a way no other bureaucratic unit can do. Finally, the Appeals Council is important because it has a call upon the talents and knowledge of a corps of members and OAO analysts possessing unique experiences gained from long operation in a special bureaucratic perspective. No one should take the Appeals Council -- its powers and its objectives -- lightly.

Having investigated the purposes, structure and operation of the Appeals Council, and having assessed its institutional performance and its potential for the future, we conclude that four possible avenues are available. The current options, as we see them, are:

1. Preserve the status quo, retaining the Appeals Council essentially as it stands;
2. Abolish the Appeals Council entirely, redistributing its missions and resources elsewhere;
3. Modify the Appeals Council, optimizing its performance as a case-handling entity;
4. Reform the Appeals Council, emphasizing its role as a mechanism for identifying, promulgating and disseminating ideas for improvement in the adjudicatory bureaucracy as a whole.

As we elaborate below, each of these options deserves to be taken seriously, and each holds certain attractions. At length, however, for reasons spelled out in this section of our report, we strongly prefer Model 4, and we recommend its immediate adoption.

B. Model 1: Preserving the Status Quo

Maintenance of the present system, with no major alterations, is always a logical possibility. One should not rush to dispose of a government institution that has weathered the bureaucratic storms for almost half a century.

In fact, the Appeals Council has managed to do a job, and to do it with some success. It has, to date, somehow been able to keep chugging along, it has not crashed precipitiously into bureaucratic rubble, and it has helped, in some measure, to promote several important SSA objectives over the years.

Although the Appeals Council has drawn heavy criticism from diverse quarters, it has also managed nonetheless to churn out 50,000 cases per year and has generally maintained a low profile, suggesting that even its most severe critics have chosen to target most of their ire elsewhere, as other components of the SSA bureaucracy have earned (or fallen into) even greater public and Congressional scrutiny. Adherants of the "If it ain't broke, don't fix it" school might therefore argue that the organization, for all its flaws, does somehow do something useful, and that radical change promises no guaranty of greater success.

In fact, however, the system is broken; it does need fixing, and urgent attention is required. The record of the Appeals Council, despite the best efforts of some very capable people, is wholly unsatisfactory. Fundamental change in several areas is now required.

Our review of the foundations of the organization convinces us that the Appeals Council as an institution fails to achieve the goals identified for it, and fails any more to contribute much to their pursuit by other bureaucratic units. This is not a transitory or superficial phenomenon -- it is the inherent result of deep, permanent flaws in the structure of the Appeals Council, and in the selection of its central mission.

The goals of the Appeals Council are of surpassing importance; unfortunately they are simultaneously of surpassing complexity and difficulty. Some of the goals (such as enhanced policy development) have simply been abandoned by the current Appeals Council due to the crush of the case load; others (such as attaining fine-grained decisional accuracy in the closest cases) are simply too ambitious, beyond the ken of any even theoretical disability adjudicator or reviewer. Achievement of other goals has been subverted by failures in the organization or operation of the Appeals Council, particularly by the overwhelming flow of cases.

We find, moreover, that the Appeals Council, as currently operating, imposes unacceptable costs upon the disability program of the Social Security Administration: costs of money, diverted resources, delay, and public image that are substantial and, we believe, avoidable.

We hasten to add that our criticism of the Appeals Council, and our conviction that Model 1 is no longer viable, should not be confused with any hostility toward its current personnel. Indeed, we have a great deal of respect and admiration for the members of the Appeals Council, many of whom embody the grandest traditions of the federal civil service. The incumbents include individuals of great talent and character, striving mightily to promote the professionalism, fairness, and sympathy that we would all like to see in SSA. Our distaste for the current functioning of the Appeals Council is therefore in no way an indictment of its members' skills or commitment; unfortunately, the members' sincerity in approaching their task is exceeded only by the impossibility of the task itself.

In short, we reject Model 1. The existing structure of the Appeals Council has nothing behind it more compelling than simple bureaucratic inertia, and we conclude that the time has come for profound change.

C. Model 2: Abolishing the Appeals Council

The diametric opposite of Model 1's preservation of the status quo would be Model 2's proposal for outright elimination of the Appeals Council, with its remaining functions and staff being transferred elsewhere.

1. Arguments for Model 2

This course of action has been recommended repeatedly, with increasing vigor, by a diverse group of voices. Many claimants' representatives, for example, have called for abolition, as have a number of scholars. Congressional legislation is regularly introduced that would accomplish this objective, and federal court judges have endorsed the idea. Early in the Reagan Administration, the leadership of SSA, too, seemed to favor this course.

There are, in fact, good reasons to support abolition. As noted above, Appeals Council review is now largely superfluous: it changes the results in only 5% of the cases,[368] a statistic which by itself may constitute a *prima facie* case for abolition. The Appeals Council, as discussed, does not contribute appreciably to the institutional goals of SSA, and there is little intuitive reason why a fourth tier -- a fourth bite at this particular apple -- is worthwhile.

The Appeals Council, moreover, is expensive: it consumes millions of dollars, a number of talented people who could be used productively elsewhere, and time -- time which delays the finality of the adjudicative process and thereby squanders one of SSA's most precious resources, the support and confidence of the claimants.

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[368] *See supra* note 248 and accompanying text.

These major indictments of the current Appeals Council, and the difficulty of adequately restructuring it, suggest that a clean break may be the wise course -- abandon the Appeals Council as a failed enterprise, rather than try to resuscitate it. The Appeals Council, in short, might be considered an idea whose time has passed, and in an era where streamlining government is important, it may not be a sound use of resources to try to teach this old dog new tricks.

2. Implementation of Model 2

Abolition of the Appeals Council would not be difficult to accomplish. Its personnel could be redistributed elsewhere within the agency -- temporary displacements would no doubt occur, but at a time when SSA is reducing its workforce so substantially, the talents of members and OAO analysts could be put to good use in other niches.

Similarly, the vestigal functions of the current Appeals Council could conveniently be hived off elsewhere. For example, ODO and other SSA service centers could send their "protest" cases[369] back to the originating ALJ, instead of to a central reviewer. True "technical errors" could then be efficiently corrected at the source, via a reopening. Also, the quality assurance role of the Appeals Council could be served by a dedicated quality assurance staff (perhaps a rump of the existing Appeals Council and OAO) which, in conjunction with SSA's national Chief ALJ, could provide on-the-job training for new ALJs. The Bellmon review function could be statutorily removed, or performed by other, less important, units.

One salient aspect of Model 2, and a frequently-cited argument against it, is the fact that under an abolition scheme, ALJ decisions would become the final agency actions, immediately reviewable in court, without interposition of a further "Secretarial" review. While this would certainly be a departure from the most commonplace structure of administrative law (in which usually -- but not always -- there is another post-hearing administrative stage prior to recourse to the courts), we do not find this arrangement implausible.

First, there is nothing in the APA inconsistent with the Model 2 scheme. The fact that the statute implicitly permits an Appeals Council does not mean that one is required, and ALJs are legally competent to have the last word for the agency. (As a practical matter, ALJs now deliver the last real word for the agency in most cases, because the Appeals Council caseload prevents it from effectively intervening.)

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[369] See supra text accompanying note 238.

Second, there is no reason to fear that ALJs, once freed from the spectre of Appeals Counci review, would suddenly become more abberational (or more independent or more generous.) In fact, the ALJs are likely to continue to behave responsibly, for all the reasons that they now do -- the Appeals Council contributes little to "ALJ discipline," and abolition would not remove any of the system's important "checks".

Most importantly, we conclude that abolition of the Appeals Council would not, as some have asserted, immediately "flood" the federal courts with massive increases in the number of disability filings. We share the concern for protection of federal court dockets, and are sensitive to the need to avoid bumping still more of the cases from administrative to judicial resolution. But we conclude that compared to the various other barriers to entry into the federal courts -- including cost, delay, simple exhaustion and the need for an attorney -- the factor of Appeals Council review is negligible, and its removal would not make an appreciable difference to the system.

3. Conclusions about Model 2

We have a great deal of sympathy for this course of action. We have found the existing Appeals Council seriously wanting, and it is not obvious that remedial actions are possible or likely. Nevertheless, our skepticism about the institution does not obscure our respect for its potential; and our appreciation for the vital needs that the Appeals Council might address makes us want to give systemic reform one more chance. Therefore, we do not at this time recommend abolition.

However, should our preferred recommendations, or something like them, not be accepted and implemented, then we would fall back to the abolition option. In short, the Appeals Council can not continue as it is; if the recommended improvements are not promptly forthcoming, or if they prove inefficacious, then the Appeals Council ought to be abolished.

D. Model 3: Optimizing for Case Handling

The next major alternative for the Appeals Council is to restructure the present organization in order to perfect its ability to handle the cases, and to improve the prospects for making a meaningful contribution to the pursuit of traditional goals such as accuracy and consistency. Under this alternative, the Appeals Council would continue in largely familiar patterns, with basically consistent objectives, but would be improved in order to do the job better.

1. Arguments for Model 3

The principle upon which Model 3 is based is that the most important function of appellate administrative review, and the job which the present Appeals Council has the most experience and expertise at doing well, is the scrutiny of individual cases. Members know how to read an ALJ opinion, they know how to peruse a claims file, and they can spot poor hearing procedure and bad decisional products. ALJs, for all their strengths, make errors, and the Appeals Council can correct them, before the wrongly denied applicant is put to the time and expense of litigation, and before the wrongly allowed applicant is incorporated into the disability rolls. Even if perfect accuracy is elusive, there is much that the Appeals Council could still do to interdict the most blatant errors.[370]

Aside from pursuing accuracy, the Appeals Council could also do more to develop consistency within the program. Treating like cases alike is fundamental to due process, and the absence of central control would threaten even greater dispersion among the lower decisionmaking units. Although the Appeals Council to date has not been notably successful in generating this national uniformity, perhaps relatively modest reforms would enhance its performance. By handling individual cases more purposefully, and by developing additional feedback mechanisms that directly address the problems of vertical and horizontal inconsistency, the Appeals Council may be able to pursue these goals more effectively.

2. Arguments against Model 3

Our criticisms of a focus on decisional "accuracy" as a goal have already been elaborated: we consider it an undefinable and largely unmeasurable target. The disability cases are simply too subjective, and too variable; appellate review too often becomes merely a vehicle for the subsequent authority to substitute its judgment for that of the prior decisionmaker -- in close cases (which is where the most interesting problems are) this may change the results, but it is hard to call it an honest improvement toward "accuracy." Moreover, even if this level of accuracy were not so elusive, we would still not consider it especially worth the price: exquisite accuracy in the close cases is not very valuable socially -- at least not so valuable that we would be troubled by stopping at only three, rather than four, levels of administrative adjudication.[371]

Consistency, too, is a valuable commodity, but we question whether it can be achieved by simply reviewing and correcting individual cases. Even if the Appeals Council could be strengthened in its capability for enforcing consistency, we conclude that there is a limit to the amount of uniformity that could be achieved just via working the cases.

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[370] See supra text following note 331.

[371] See supra text accompanying note 331.

Moreover, the Appeals Council as a case-handling institution imposes certain other costs upon the system as a whole -- costs of delay, reduced public acceptability, etc. -- that would not be ameliorated merely by refining its present routines. Even if the Appeals Council were streamlined, and dispatched its docket with greater finesse, that would still not be enough to justify its lofty position in the bureaucracy.

3. Implementation of Model 3

If the Appeals Council were to be modified to enhance its case-processing role, a number of important changes would be required. Essentially, these would "judicialize" the Appeals Council, making it more of a true court-like body, designed to deal expeditiously and carefully with its docket.

While we do not, at this time, recommend adoption of Model 3, we think that it deserves to be elaborated and taken seriously, and that the contrast between it and Model 4 will help explain the basis for our preferred outcome.

Model 3 would incorporate the following six features:

a. Legal and Bureaucratic Protection for the Members. Under Model 3, the Appeals Council really would be serving as appellate reviewer of the work of ALJs, and we would consider it inappropriate for members to lack the same protections that ALJs enjoy.[372] If the relationship between ALJ and Appeals Council is to approximate the relationship between a district and circuit court, then both tiers would need the same full measure of APA independence. The fiction of the Appeals Council performing a "political" act, in the name of the Secretary, is utterly inapplicable to the high-volume, fact-intensive world of Social Security disability. The reality is that the Appeals Council members, like the ALJs, perform a quasi-judicial function, not a quasi-political one; guaranties of independence are important for propriety and for the appearance of propriety.

Concomitant with this enhanced status under Model 3 would come a change of title: from "member" to "administrative appeals judge", and from "Deputy Chair" to "Chief Judge". (We would also assume that the Associate Commissioner's slot would remain, but that position would no longer carry an ex officio seat on the Appeals Council.)

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[372] See supra note 125.

Also under this plan, the Appeals Council, along with the corps of Administrative Law Judges, would be bureaucratically relocated outside the normal line of the SSA hierarchy. Oversight, even benign administrative oversight, by political officials such as a Comissioner, Deputy Commissioner and Associate Commissioner would be inappropriate for a truly judicial body. Instead, the adjudicators would have to be physically and bureaucratically insulated from SSA, which would stand as an interested party in the ongoing case decisions. The Office of Hearings and Appeals as a whole, therefore, would be moved to the Office of the Secretary of HHS or, better still, to an independent adjudicatory agency.

b. Less "Second-Guessing" of ALJs. The current articulated standard of review of the Appeals Council is a check for "substantial evidence" to support the conclusions of the ALJ.[373] However, no one believes that this is always honored. Instead, the Appeals Council (like the federal courts that review it) often substitutes its own judgment for that of the prior adjudicator, finding a witness not credible, finding the evidence unpersuasive, etc. This type of examination not only consumes too much of the Appeals Council's time, it undercuts the respect for the ALJ and elevates second-hand over first-hand assessments of demeanor, credibility, etc.

A corrective device could be simply a call for greater self-restraint on the part of members, reserving their attention for the truly unsupportable ALJ actions. A more concrete step, however, would be to revise the standard of review, to one which enabled the Appeals Council to undo an ALJ action only when it was found to be "arbitrary." Because we think that under Model 3 the Appeals Council would reserve its attention for the most egregious ALJ errors, reining in the worst deviations from established practices, we conclude that an arbitrainess standard would be the appropriate method for handling the cases expeditiously.

c. Time Limits. To be effective as a Model 3 tribunal, the Appeals Council would have to do its work in less time. The single most frustrating aspect of appellate review for claimants and their representatives is the long duration of the uncertainty that they must endure while waiting for the Appeals Council to act or, more often, to decline to act.[374] Whatever else it does, the Appeals Council, under Model 3, would simply have to improve this record. Fixed timetables might be applied, and claimants might be privileged to proceed directly to court if these were not honored. The reopening powers would not be exercised simply to enlarge the Appeals Council's time.

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[373] See supra text accompanying notes 250-52.

[374] See supra text accompanying note 267.

d. Broaden the Caseload. Under Model 3, the Appeals Council would not be confined solely to receipt of claimants' requests for review of ALJ denials. It would, in addition, return to the practice of taking a substantial volume of "own motion" cases, both ALJ awards and unappealled ALJ denials.[375]

The appropriate volume of cases for a Model 3 Appeals Council is a trickier question. In principle, an administrative appellate body ought to review all ALJ decisions. If the purpose of the Apeals Council is to promote accuracy and uniformity, then the most logical way of achieving those ends is through perusal of all the cases, not just a random or other sample.

On the other hand, as a practical matter, even an enhanced Appeals Council (and even one that was increased in size, which our vision of Model 3 does not contemplate) could not effectively consider a four-fold enlargement in its current case load. Some selection process, therefore, would have to be continued.

e. Close the Record After the Hearing. Again, as an appellate body, the Model 3 Appeals Council would not receive new evidence. It would review a closed record and leave it to the trial level (the ALJ) to consider any petition for reopening for the receipt of new material evidence.[376]

f. Better Support. The Appeals Council now labors under an inadequate supply of space, support personnel, and computational capacity. These would have to be upgraded under Model 3, perhaps in a fashion similar to our recommendations for improvements in these services, as contained in part E.3.f., below.

4. Conclusions about Model 3

We believe that Model 3 would be feasible. It would represent a substantial upgrading of the current Appeals Council, and would be designed to optimize its ability to handle prodigous volumes of cases expeditiously. Model 3 focuses exclusively on the goals of accuracy and consistency, and shaves off any explicit attention to the other possible goals of the organization; if the Appeals Council were transformed into this type of highly specialized entity, we believe that its performance on those critical parameters could be appreciably upgraded, at modest cost.

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[375] See supra text accompanying note 233.

[376] See supra text accompanying note 255.

On the other hand, we do not consider this option wise, and we do not recommend its adoption. Our reticence stems from the twin observations 1) that merely reviewing cases once again for accuracy and consistency is not such an overwhelming value in a system as large and subjective as SSA -- this task could be done, but it would not be worthwhile, and it would risk hypertrophy of what should be one of the system's lesser capabilities -- and 2) that the bureaucracy has other needs and other more important shortcomings that the Appeals Council is uniquely suited to address. If SSA uses the Appeals Council only as a stopgap, to process and correct the caseload, that could probably be accomplished well enough, but it would be a serious waste of a potentially valuable asset that can and should play a bigger role in the disability system.

For that reason, Model 3 is disfavored. Many of its specific implementing steps have inherent value, and several are recapitulated or modified in the discussion of the model we do prefer, but the overall organizing concept of Model 3 -- to entrench and refine the Appeals Council's current fixation with the individual cases -- we think inappropriate.

E. Model 4: Optimizing for System Reform

The final option, the one that has attracted our support, would reformulate the Appeals Council as a rather different sort of entity. It would still handle individual cases, and still serve a role in the identification and correction of errors, but that would no longer be the driving force behind its existence. Instead, the Appeals Council would function principally in a "systems reform" capacity, attempting to discover, elaborate, and implement changes in the entire disability adjudication system that could lead to better, earlier decisionmaking.

The individual cases, in this scheme, would remain important in their own right, but would also assume even greater significance as the raw data upon which analyses for system reform could be constructed. In other words, in Model 4, the cases (although far fewer of them) are still the primary input into the operation of the Appeals Council, but the primary output of the organization becomes "clarifications of policies" or "ideas for change," rather than simply a mass of corrected individual adjudications.

1. Arguments for Model 4

The rationale for the systems reform concept starts with the assessment that the Social Security Administration needs more assistance in the performance of the functions of policy development and program integrity, and that the Appeals Council is well matched to fulfill this need. We do not see SSA's disability programs as being in shambles -- in fact, they appear to be functioning with surprising regularity, managing, somehow, to deal with overwhelming stresses each year. But the institution does need more help, more guidance in avoiding pitfalls and more insight in operating with greater efficiency and with a modicum of public support.

The Appeals Council, we conclude, is admirably well-suited to provide at least some of this needed asistance. It comprises an expert, experienced corps of senior officials, competent and imaginative, and blessed (or cursed) with access to a steady stream of diverse cases. It is the opportunity to collect these cases that occasions our hope for a "systems reform" role for the Appeals Council -- this is the only locus in the bureaucracy where all this rich raw data may be efficiently processed for thoughtful adjudication, and the important lessons extracted for the benefit of the entire system.[377]

Moreover, we believe that in the long run, there is no trade-off between the error-correction function and the systems-reform function. That is, the whole point of reforming the system is to enable it to operate with greater precision and speed -- if the plan works, the entire SSA adjudicative bureaucracy will operate more efficiently, making more accurate decisions and making them sooner. There would thus be fewer errors thrown up to the level of the Appeals Council, and fewer wrongful administrative denials to pursue in court. To return to the aquatic analogy, this function of the Appeals Council endeavors not merely to stem the flood of cases that threatens to overwhelm the federal courts; it aims at turning off the spigot of cases at, or near, the source, so that the raging torrent no longer develops.

2. Arguments against Model 4

One concern is that, even if systems reform does lead to better long-run performance by the adjudicatory bureaucracy as a whole, in the short run there will be fewer cases handled, and fewer errors caught, by the Appeals Council. Thus, at least some of the eligible claimants, those who are now denied by ALJs but paid by the Appeals Council, will be disadvantaged. They would have to go to court to enforce their claims, or abandon them altogether. It is hard to predict exactly how many people there might be in this category, but the number might not be negligible, and this would be a significant start-up cost of the transition to the new system.

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[377] See supra text accompanying note 344.

Another plausible concern is the apprehension that even if the institution of the Appeals Council is well-suited to systems reform work, some of the current members of the organization might not be so personally well-adapted to the new role. They were, after all, not selected with this type of function prominent in the job description, and their training and experience has largely emphasized other values. We take this objection seriously, but do not find it controlling. In fact, our observation of a number of current members convinces us that as a whole, they are well suited to this new type of work, and can be retrained to perform at a high level. The experience of recent years has not emphasized systems reform opportunities for Appeals Council members, but we are confident that the current membership could make a substantial contribution, and that successors selected with this role in mind could do even better.

3. Implementation of Model 4

This plan differs in important ways from the "case-handling" paradigm sketched above as Model 3, but in many respects, the needed reforms in the current operation of the Appeals Council are congruent, and some of the recommendations made in this section will parallel, or expand, the comments made in part D above. Other recommendations, however, reflect the unique demands of an organization dedicated to systems reform, as opposed to individual case processing. We have identified six basic categories of changes that this model would require in the operation of the current Appeals Council.

a. Control the Case Load. This is the critical starting point for many of our subsequent recommendations. The Appeals Council simply must regain control over its docket -- as long as it labors under the weight of 50,000 or more case files per year,[378] we despair of giving the members anything else useful to do. The recent volume of traffic has consumed all the resources of the organization, and has bent the members entirely to the task of churning out the cases, usurping any opportunity for reflection or innovation.

We do not know precisely how many cases is the "right" number for the Appeals Council to accept under the recommended plan, but we estimate that something on the order of 5,000 to 10,000 cases per year at the review level (i.e., 10-20% of the current caseload) would be appropriate. It is vitally important that the Appeals Council stay in the business of handling a substantial number of cases -- without that unique source of input information, the Appeals Council would become just another policy body divorced from the reality of the adjudication process. At the same time, however, the members must be able to surmount the piles of files, reflect upon the lessons that they contain, and carefully strategize about how to derive and implement needed changes.

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[378] See supra text accompanying note 289.

In addition to regulating the volume of its cases, the Appeals Council must also be able exercise more control over the types of cases it sees, and we propose that the cases to be considered by the Appeals Council should be selected by the Appeals Council itself -- not by the disappointed claimants or by mailroom clerks' random choice. The Appeals Council should develop a strategy, assessing which categories of cases are most appropriate for scrutiny at any particular time -- and the categories could change with some frequency. We envision at least three general types of cases that the Appeals Council could usefully, and selectively, attack by careful sampling of a focussed group of cases.

i. New issues. The Appeals Council might well select for review a fixed number of cases that implement any new and potentially difficult regulations or procedures. (It could, for example, concentrate on recent mental impairment cases, on AIDS-related cases,[379] or on cases that raise some particularly tricky issue of the new medical improvement standards.) Thus, the Appeals Council could provide quick feedback about the fashion in which the field offices and ALJs were beginning to process new matters, promptly identifying areas in which further clarification or training was necessary.

ii. Known problem areas. The Appeals Council might also focus attention, at a particular time, on any of several longstanding SSA disability issues, in which existing regulations were known to be problematic. Allegations of disabling pain unaccompanied by corresponding physical findings, for example, or assertions of disability via substance abuse, are perennial problems, and they might benefit from a sharp inquiry into the cases as they are actually handled in the field. The intersection between SSA cases and the decisions of a particular federal court in an acquiesence situation might be another example. The Appeals Council could undertake to study any of these issues by surveying a run of the ALJ and DDS outputs, in a way no other entity could easily do.

The Appeals Council might also be able to develop, over time, a profile of certain types of "error-prone" cases -- situations in which an ALJ or DDS is more likely to mistakes. Over time, it might become known that accuracy was particularly contentious in cases, for example, that raise transferability-of-skills disputes, or in cases where the claimant's treating physician and the SSA consulting physician disagreed regarding the diagnosis. Many authorities already concur that mistakes are not distributed randomly throughout the SSA caseload, but only the Appeals Council could conveniently perform the detailed analysis to try to figure out precisely where the worst occasions for repeated error truly lay.

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[379] See Social Security Ruling 86-20 (1986).

The possibility of targeting particular ALJs, instead of particular types of cases, is more problematic.[380] At this time we would not recommend a system of Appeals Council focus on "error-prone" ALJs, because the trauma of targeted Bellmon review was so destructive for the system and so damaging to the fabric of the relationship between the Appeals Council and its clients. But we would note that the dispersion of award rates among ALJs is greater than the system can be comfortable with, and it is possible that review guided at least in part by the track record of individuals or individual offices could play a role.

In this vein, the Appeals Council should be able to accept cases "certified" by ALJs who were uncertain about the application of a particular policy or standard. The Appeals Council, in fact, could invite this type of certification on selected matters, to determine precisely which types of cases were proving problematic for the lower tiers of the adjudication process.

iii. Random selection. Although we are generally uncomfortable with chance as an element in the selection process -- the concept smacks of justice by lottery rather than by individualized assessment -- we would permit the Appeals Council to elect, if it deemed fit, to review a certain number of cases at random. This would be a component of the Appeals Council's mandate for "fishing expeditions" to discover possible areas of cases for further future inquiry. That is, careful review of a run of random cases might suggest, for the first time, that there is another problem of the sort identified above, that would warrant intensive scrutiny.[381] We do not anticipate that this random selection would be a very important part of the Appeals Council's docket in the near future (there are plenty of problems of the first and second categories to keep it occupied for some time) but if this backlog were whittled down, random selection might become an engine for identifying additional categories for review.

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[380] See supra text accompanying note 234.

[381] Observers in other administrative contexts have supported the value of these "fishing expeditions": "A succession of mine-run cases may hold hints of the emergence of new problems the significance of which the agency's staff may not be as likely to recognize." Freedman Rep., supra note 2, at 153.

In all of this, the Appeals Council should have the ability to adjust its own jurisdiction, to change the makeup of the cases from time to time, and to remain flexible enough to uncover new areas in which its ability to study a run of cases with care could enable it to make a special contribution to the policymaking process.

It is worth noting here that the Appeals Council should be concerned with both allowances and denials -- until evidence suggests that attention should be focussed in either direction on a particular line of cases, the Appeals Council should look carefully at both sides of the product. Similarly, the Appeals Council should be at least as concerned with the product of the "best" ALJs and the "best" hearing offices, as with those at the other end of the spectrum -- part of the mandate is to discover what works well within the system, what attributes allow the best individuals and offices to be the best, and how their successes and strengths can be replicated throughout the system.

b. Enhance the Appeals Council's Role in Providing Input to the Policy Process. Fundamental to our concept of the Appeals Council is the notion that its basic mandate should be to offer assistance to the policymaking and policy-implementing process. The underlying purpose of its still-voluminous review of the individual cases is to provide a data base upon which the members can intelligently provide advice and assistance to the officials who make important policy decisions. We see this role being implemented in three ways.

i. Recommendations. First, when the issue at stake concerns large, important areas of policy, the Appeals Council can serve in an advisory capacity. The Appeals Council should conduct independent studies of its case load, and offer its conclusions and recommendations directly to the responsible policy officials. Also, the Appeals Council should delegate members to serve on various agency-wide ad hoc study groups, designed to discuss and propose new policies and practices. Again, the Appeals Council's perspective, based on systematic review of the cases, should provide an important source of knowledge for these committees.

The Appeals Council already has some experience in serving in these capacities; members have occasionally served on SSA study groups, and have suggested new SSRs.[382] What we propose is that this activity be greatly expanded and made into a centerpeice of the members' activities -- to transcend the individual cases and study and recommend new regulations, SSRs, and other policy changes that could lead to better disability adjudications.[383]

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[382] See supra text accompanying note 311.

ii. Policymaking. Second, the Appeals Council should play a bigger role regarding the range of somewhat smaller policy choices -- those that do matter in processing the cases, but do not rise to the dignity of a regulation or SSR. Here, the Appeals Council should directly exercise leadership, providing guidance to the ALJs and the DDSs in the form of well-reasoned and carefully-articulated case decisions and policy pronouncements, which would have precedential impact on future deliberations. At least two vehicles are already available for this purpose: case decisions and Appeals Council "minutes".

The usual run of disability cases is so fact-specific that occasions for issuing forward-looking decisions are not frequent, but the Appeals Council should seek them, and seize the opportunity to promote uniformity by advertising throughout the system any common, successful approaches to the cases. Similarly, the Appeals Council can accomplish much the same goal, outside the context of any particular case, by returning to its former practice of issuing minutes that reflect its agreed posture regarding the details of some specific case or category of case matters.[384] These, too, can upgrade the entire claims adjudication process, by developing, based upon mature consideration of the cases, improved mechanics that can be relied upon nationwide.[385]

In this context, the Appeals Council should also be responsible for advertising its work -- both its precedential cases and its minutes -- throughout the disability system. It should ensure that ALJs, DDSs, district offices, and claimants' representatives know in advance the best types of procedures and substantive standards that ought to be followed in the cases. The Appeals Council can thus promote uniformity and policy integrity by filling in the gaps inevitably left by the more weighty and ponderous tools such as rulemaking.

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[383] Administrative appellate boards are frequently charged with this type of role in policymaking: "The [intermediate review] Board is expected to contribute through its work to the formulation, rather than the mere application, of agency policy." Freedman Rep., supra note 2, at 138.

[384] See supra text accompanying note 317.

[385] Policies derived from careful scrutiny of actual cases, rather than solely from abstract theorizing about the agency's needs, are particularly likely to be useful and valid. See Capowski, supra note 64, at 376.

This does not require that all Appeals Council decisions be published -- even a reduced caseload of 5,000 or 10,000 is a chore to disseminate -- but it does mean that the Appeals Council should look for opportunities to make its decisions worthy of publication, and ought to distribute far more of them far more widely. The current OHA Law Reporter is but a shadow of the degree of publication (and of effective indexing) that we have in mind.[386]

iii. Experimentation. The third avenue for participation in the policy process is for the Appeals Council to use its unique vantage-point to identify, encourage and exploit opportunities for conscious experimentation. The various DDSs, district offices and ALJs have a wealth of diverse experience on handling claims, but these resources are largely untapped. The Appeals Council should study the lower tiers, discover which ones have developed innovative improvements, help them refine their experiments, and, as appropriate, export the best ideas to other units. Although the substantive definitions and standards for eligibility should remain consistent throughout the country, there is less need for the implementing procedures to remain rigidly in lock-step, and local experiments, as supervised and studied by the Appeals Council, could hold the prospect for greater efficiency in the future.[387]

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[386] Other observers have also noted that an appellate body can play a useful role in the agency, promoting consistency in decisionmaking, by advising the lower tiers about which adjudicative processes will be ratified on appeal, and which are likely to be rejected. "[H]earing examiners have learned that the Review Board's success in the predictable application of standards has increased their opportunities to make decisions that will not be appealed or that will stand upon appeal." Freedman Rep., supra note 2, at 149.

[387] The preservation of this type of individualizing discretion is essential for a complex administrative structure such as SSA. The lower tiers must be accorded the opportunity to work the cases with intelligence and sensitivity, not just blind adherance to policies that are inevitably styled with the standard situations foremost in mind. This is not to deny the importance of rules, nor to justify extreme departures from them, but we do maintain that the role of human judgment must be sustained. See Capowski, supra note 64, at 354, 372 (discretion for ALJs is essential and inevitable for SSA); Ellis Rep., supra note 2, at 166-67 ("[T]he consensus...is that the responsibility vested in the hearing examiners under the discretionary review procedures, has improved the quality of the examiners' work

(Footnote continued)

c. Revise the Case Correction Role. Although the major role of the Appeals Council should be to use the cases as sources for ideas about system reform, it will still have the occasion to review a large run of individual cases. A number of subsidiary matters arises in this context.

i. Consider the cases in more detail. Fundamental to our concept of a reformed Appeals Council is the picture of an appellate body that really considers the cases carefully, analyzes them with deliberation and reflection, and is able to take the time to accord each one a thoughtful, provocative inspection. We have in mind, in short, a body that goes more slowly, pondering the cases more exhaustively.

We also have in mind a body that operates in a more integrated, collegial fashion, with members analyzing cases collectively and consulting about them frequently. We want the members to discuss and debate with each other often, trying to compare ideas and seek common solutions. Greater reliance should be placed upon decisions by panels, perhaps composed of three members, in order to ensure greater consistency and enable all members to learn together. Meetings en banc should become more frequent as the crush of cases is reduced.

We also recommend making greater use of the claimants and their representatives. Oral arguments should be held with some frequency, to identify the important, precedential aspects of the cases, and to raise ideas for management initiatives.[388] Claimants should be notified about the issues that the Appeals Council is inspecting, and encouraged to respond with detailed argumentation. Organizations of claimants' representatives should be apprised whenever the Appeals Council changes the mixture of cases, and the types of problems, it is going to address, and they should be invited to submit amicus briefs. There is a great deal of expertise and knowledge available in the claimants' bar, and the Appeals Council should try to draw upon it with regularity.

The Appeals Council decisionmaking process, too, should slow down, and the files must be perused carefully -- no more whipping them in and out of a member's office with an average of 15 minutes' consideration or less.[389] In order to extract the

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387(continued)
product,...and has enabled the [Board] to dispose of many cases without review.")

[388] See supra text accompanying note 282.

[389] See supra text accompanying note 291.

possible lessons of the cases, the members and analysts will have to process them much more diligently -- including, where necessary to the purpose for study of the particular type of case, playing the tape recording of the hearing.

Finally, the decisions issued by the Appeals Council will have to be substantially upgraded: if the opinions are to have precedential impact, and if they are to carry due weight among the federal courts and the street level bureaucrats, then they will have to earn respect through the detailed presentation of law, evidence, and logic. We look forward to the Appeals Council drafting opinions that -- even if not rivaling the federal judiciary in length or diversity -- are at least clear, responsive, forward-looking and individualized enough to be free of mindless boilerplate or rote summarizing of the documentation.

ii. Role in correcting the cases. When the reformed Appeals Council moves more slowly and carefully through the cases it reviews, it is not immediately obvious what its role should be in correcting the errors that it may find. Three possibilities, in fact, appear.

First, the Appeals Council might have no role whatsoever in correcting errors -- even when it discovered mistakes, it could leave the ALJ's work undisturbed, because the function of the Appeals Council under our proposal is to look to the system as a whole, not to any one tiny output of it. A second model would permit the Appeals Council to remand an erroneous case back to the ALJ -- not with binding instructions to reverse it, but with a commentary explaining what problems have been identified, and suggesting that the ALJ might wish to exercise his or her discretion to look at the matter again. Finally, the Appeals Council might retain its current capacity for correcting, or remanding with instructions, any cases it deems flawed, even while it would devote the bulk of its attention to generalizations that it may draw from the particular incident.

Each of these variants has its attraction. The first two would enable the Appeals Council to concentrate its attention exclusively upon its central mandate, without the distraction of having to worry about effectuating individual cases. The second would even have the additional virtue of ensuring that error cases are not totally overlooked -- the ALJ might elect to remedy any mistake that the Appeals Council identified.

At length, however, we consider the third variant the most desirable. Under it, the Appeals Council could continue to focus primarily upon its reform capacity, without sacrificing entirely its current case-handling role. It would directly ensure that errors were not allowed to slip through, and it could use the occasion of decisions and remand orders to instruct the bureaucracy personally, teaching via the mechanism of prompt, focussed feedback. By correcting, or remanding, the errors that it sees, the Appeals Council would be forced to stay in intimate contact with the cases -- its legitimate source of expertise for a policy role -- and assist claimants, ALJs and others directly.

The mere fact that there can be a serious question about the Appeals Council role in case correction -- even if we ultimately do not propose to alter its existing powers -- is itself instructive. It demonstrates, first of all, that the primary function of a reformed Appeals Council is to transcend the individual cases, to generalize from them, and to identify the larger lessons they present. Second, it also demonstrates that the reason to act upon ALJ errors is not (as it too often seems to have been) simply to forestall a losing court battle -- instead of correcting "harmless error" for the purpose of making cases stand up better in court, the Appeals Council should inquire into all types of "error", to determine why they are made, how they can be prevented, and how deserving claimants can be identified and paid most quickly and easily.

iii. Standard for review of cases. When it inspects cases and moves to correct them, the Appeals Council should become less "interventionist", less prone to overturn ALJ findings and substitute its own judgment. Two rather different standards of review are required.

First, regarding ALJ determinations of fact, the Appeals Council should be bound by a standard of "arbitrariness," rather than the current "substantial evidence" test. As noted above, the "substantial evidence" criterion is breached too often; even when honored, it encourages the Appeals Council to try to fine-tune the cases for a degree of subtle accuracy that we do not consider significant. We want the Appeals Council to try to correct big errors -- substantial deviations from established standards -- and to use its experience for large policy purposes, not to second-guess an ALJ on a close call.

Second, regarding ALJ interpretations of law, the Appeals Council need show less deference. An ALJ who misunderstands the governing principles of a case, or who misstates the law, ought to be corrected. The dividing line between "factual" and "legal" issues may be a subtle and elusive one in an area so laced with detail, but it is a distinction that reviewing courts traditionally must make, and it should be an Appeals Council responsibility, too.

iv. Close the record after the ALJ stage. As noted above, we think the case record ought to be closed before the file is transmitted to the Appeals Council.[390] The system ought to encourage claimants to make every effort to collect and submit all probative evidence to the ALJ; if new and material evidence arises subsequently, the claimant may seek a remand back to the hearing level and submit a motion to reopen the file for its receipt. In the absence of good cause for reopening, the additional evidence could be associated with a new application. We do not think that the Appeals Council should be in the business of receiving new evidence -- its review should be more nearly appellate, on a closed record.

We appreciate that it is often difficult for claimants to assemble all the potential evidence quickly, and that where an ongoing condition continues to dereriorate, it is somewhat artificial to select any particular cutoff date for closing the file. However, orderly litigation, and a respect for the finality of administrative judgments, suggest the importance of segregating the trial-level and the appellate-level functions more strictly.

v. Improve timliness standards. The problem of Appeals Council delays would be greatly mitigated under Model 4: most cases would not have to lie before the Appeals Council at all in order to exhaust administrative remedies, and those that did should be able to receive more swift consideration as an adjunct to the reduced caseload. Nevertheless, it might be advantageous to specify timliness standards at the outset, and we think that the Appeals Council should be held to quite high levels of promptness.[391] Under Model 4, the Appeals Council ought to be able to decide, within 30 days of the ALJ's decision, whether the case meets one of its current profiles. It could then have an additional 60 days to work the case (more, if delays were attributable to the need to await some commentary or other input from the claimant.)

Cases remanded by the Appeals Council to the ALJ would be processed on the hearing office's regular calendar, although they might receive some special expedited handling.

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390 See supra text accompanying note 255.

391 OHA leadership recognizes the imperative of improving the agency's performance on timliness. See Bradley, supra note 298 ("There are two themes in terms of overall OHA concerns that I will strike repeatedly, sound consistently, and they are: service to our claimants. We need to assure that the claimants in this country get their day in court as expeditiously as possible. Justice delayed, in my view, is no justice at all. Irrespective of the validity of the claimant's claim, that claimant believes he or she is entitled, and we have a right and an obligation to respect that belief. I find it unconscionable that a claimant must wait 365 days to know where he or she stands with respect to a benefit package. We have got to do better." (The second "theme" is protecting the trust fund.)

The Appeals Council should not, moreover, be empowered to reopen a case merely because it has missed the ordinary deadline for review -- only factors such as fraud, clerical error, or obvious mistake should disturb the finality of the decision.

vi. Final agency action. We note that under this system, as in Model 2, the vast majority of ALJ decisions would become final agency determinations, with prompt payment for awards and immediate reviewability in federal court for denials. This arrangement is certainly unusual for modern administrative practice, where most departments provide for some degree of head-of-agency review between the hearing level and the judiciary.[392]

But neither the APA nor sound principles of SSA management require a fourth administrative tier. There is nothing magical about having the agency input come after, rather than only before, the hearing. And we find nothing compelling about a "Secretarial" review that, in fact, is already so divorced from the political leaders that it has long been quasi-judicial anyway.[393]

Little is lost, by claimants or by SSA, if the final administrative word comes most of the time directly from the ALJ, instead of coming after a cursory review by an over-burdened Appeals Council.

Similarly, for reasons discussed above, we do not believe that this model will result in a surge of federal court actions. In the short run, the other inhibiting factors will continue to operate, retarding frivolous recourse to the courts, as they always have -- it is these factors, not the current Appeals Council, that has winnowed civil actions. Moreover, in the long run, the reformed Appeals Council should actually be able to reduce substantially the burden on the judiciary, as the administrative process becomes more accurate, more efficient, and more reliable.

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[392] In child labor civil penalty cases, the Secretary of Labor has delegated to ALJs the authority to make final agency decisions. 29 C.F.R. §580.32 (1986) Also, under the Contract Disputes Act, Pub. L. No. 95-563, the Board of Contract Appeals makes final agency decisions in government contracts cases. 31 U.S.C. §1304 (a).

[393] The theory of administrative reviewers performing a "secretarial" function may have some validity in situations where ALJs handle cases involving important aspects of economic regulation of key industries or corporations. Today, however, the vast majority of ALJs, including all those in SSA, are concerned instead with "micro" decisions, such as public benefits, in which "political" factors are irrelevant. See Lubbers, supra note 125, at 268.

d. Improve the Status of the Appeals Council and the Caliber of its Membership. Certain changes should be made in the personnel practices of the Appeals Council, in order to enhance its ability to carry out the systems reform mission more effectively.

i. Upgrade the position. Members of the Appeals Council are now graded at the GS-15 level, the same as SSA ALJs. While we are sympathetic to the proposition that the ALJs themselves are under-graded compared to their brethren at other agencies, it is abundantly clear that the members of the Appeals Council must be ranked one step higher still. Providing a GS-16 rating for the Appeals Council has two immediate advantages. First, in a world where pay and status are inevitably linked, the promotion would by itself carry a dollop of prestige that would help underscore the new role and new importance of the Appeals Council. It could symbolize the growth of the institution and SSA's commitment to it.[394]

Secondly, and more importantly, the promotion is essential to help attract the most qualified people to the position. Membership on the Appeals Council is not now a financial step up for an ALJ, and there is little else to induce the best and brightest of the hearing corps to aspire to membership on the Appeals Council. Money, of course, is only one factor in an individual's career decisions, but it is undeniably an important one, and it is the most visible short-term fix that can be made. Over time, the reputation of the Appeals Council should grow, and ALJs should see appointment to it as the pinnacle of a career; for now, the most immediate way to elevate the institution is to dedicate a few supergrade or Senior Executive Service slots to it.[395]

ii. Upgrade the prerequisites. As the job of Appeals Council member becomes more attractive, and as progressively higher-caliber people are drawn to apply for advancement to it, the selection process can become increasingly picky.[396] It is particularly desirable that the senior ranks of the ALJ corps be seen as a fertile source of new members. The ALJs' hearing experience, their familiarity with the disability system, and their perspective on the cases are unrivaled. The Appeals Council would gain in stature by attracting the cream of the ALJ crop as members, and this would automatically give it greater credibility among the courts, the SSA leadership, and the public, as well as among the remainder of the ALJs.

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[394] Other observers have also noted the importance of ensuring that an administrative review panel have superior status. Freedman Rep., supra note 2, at 143.

[395] Upgrading the status of Appeals Council members to GS-16 would not cost the agency much money, because a) most of the current members are already paid near the federal salary cap anyway and b) we propose reducing substantially the number of members. The symbol, however, would carry considerable importance.

We would not, however, make ALJ experience an absolute prerequisite for membership on the Appeals Council. We have met with too many other people, including current members, whom we believe capable of playing important roles in the Appeals Council, and who received their background training in other parts of the system. The Appeals Council, after all, should seek members based upon their individual talents and character traits, independent of the fora in which those attributes were honed. Personal knowledge of the hearing system is certainly valuable for an Appeals Council member, but it is not the only type of experience that has proven valuable. In short, we wind up recommending a strong, but not an absolute, preference for drawing new members from the ranks of the ALJs.

iii. Member independence. We recommend that Appeals Council members should have the high level of independence now guaranteed for ALJs by the Administrative Procedure Act. We concede that under Model 4, where the primary function of the Appeals Council would be the promotion of policy development and policy integrity, there would necessarily be a strong affiliation between members and the senior policy officials of the SSA. This might seem to require less need for full independence than does Model 3, in which the members truly function exclusively as appellate judges, and where their entire role depends upon the reality and the image of autonomy.

Nevertheless, we find more to gain than to lose from APA protection for members of the Appeals Council, even under Model 4. Independence will promote status. Independence will give the members the freedom to suggest novel, even risky, new policies for efficient and equitable case handling, without excessive worry about the prevailing political climate. And since members will still, under Model 4, be reviewing and issuing binding decisions about eligibility in a great many individual cases each year, they will still be functioning in a quasi-judicial capacity, and should be acknowledged as such.

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[396] "There can be no compromise with [the principle of first-rate appointments] if the Review Board is to win respect or acceptance from hearing examiners, the agency staff, and the practicing bar." Freedman Rep., supra note 2, at 143.

We are not impressed by the spectre of independence causing members to deviate wildly from SSA policies. We do not foresee any substantial danger that APA-protected members would abuse their status by irresponsible actions for which they could nevertheless remain above discipline. In fact, the track record of fidelity to SSA is good, and the selection criteria and the proposed bureaucratic role of the members should only serve to reinforce this tendency.

iv. Number of members. The current Appeals Council has grown to its present size largely in response to the mushrooming caseload -- as many as 20 members are needed simply to handle the contemporary number of files. In a modified posture, optimized to help manage and improve policies, the Appeals Council could be smaller, and a more compact group would carry the advantages of greater integration and consistency.

There is no magic number for the size of the organization, but a smaller group, such as eleven members, seems appropriate: large enough to be able to draw within its ambit a significant volume of cases, yet small enough to sit comfortably around a single table and reflect together upon their observations, to collegially develop a shared outlook and policy.

We envision an Appeals Council that operates with a high value upon internal consultation and collaboration, that meets en banc with great frequency, and that sticks with a problem long enough for the group as a whole to develop a shared consensus on a policy or recommendation. To accomplish this degree of harmony, the Appeals Council will need to be a more manageable size.

v. Titles of the organization. Under Model 4, the Appeals Council would no longer take "appeals" -- it would decide upon its caseload on its own, not at the instigation of a disappointed litigant. A new title, such as "Review Council," therefore seems more appropriate. "Members" could retain their current titles, although we do recommend that the "Deputy Chair" be recast as a "Chair," both to reflect the current reality about who actually leads the Appeals Council on a day-to-day basis, and to underscore the organization's independence from the Associate Commissioner, who would no longer hold an ex officio seat.

vi. Bureaucratic location. Under Model 4, the Appeals Council will need direct access both to the agency's top policymakers, and to the ALJs and lower-level claims processors. It serves, in a sense, as the liason between them -- independent enough to adjudicate cases, but connected enough to affect policy.

This combination requires a new bureaucratic stature: placement of the Appeals Council under a Deputy and Associate Commissioner is logically inconsistent with the role we have in mind. Conversely, removal of the Appeals Council (as contemplated in Model 3) to the Office of the Secretary or to an independent agency also seems wrong here -- the Appeals Council must be closer to the action.

Accordingly, we recommend bureaucratic relocation of the Appeals Council to make it a component within the Office of the Commissioner.[397] Its unique mandate should enable the Appeals Council to assume this special placement, and its combination of roles would most consistently fit at the top of the SSA hierarchy, outside the purview of any line office.

e. Enhance the Appeals Council Role in Court Cases. The bulk of these recommendations deals with the "review level" operations of the Appeals Council, and that is where the greatest needs and opportunities for improvement are to be found. However, the Appeals Council also plays a major role in shaping SSA's response to cases in litigation, and this, too, is an important source of experience for the systems reform role of Model 4.

i. Supplemental review. We recommend that the Appeals Council continue its current court interface work essentially as it has been. "Supplemental review" has an odd aura about it -- it is peculiar that SSA should get a fifth chance to consider the case, and to improve the documentation justifying a denial, rather than simply defend the case as it stands (or else pay the claim.)[398] This practice has also introduced a new standard for awards ("presentation of a compelling or sympathetic -- but not legally "disabling" -- case that a court will like"), unavailable to claimants earlier in the process. Supplemental review may also be used improperly as a crutch -- suggesting that careful early claims work is less necessary, because erroneous denials can be corrected later, if the claimant has the tenacity (and the resources) to proceed to court.

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[397] There have been proposals to remove ALJs still further from agency politics, and the appearance of sensitivity to agency pressures, by creating an independent, integrated corps of ALJs available to serve all federal agencies. See Lubbers, supra note 125, passim. The same could be imagined for all federal appellate review boards.

This strategy has considerable logical appeal under Model 3, where Appeals Council members function exclusively as judges, but it is less applicable under Model 4, where the members are to focus on policy matters, and a close connection to the agency is essential.

[398] See supra text accompanying note 296.

We like the idea of attempting to negotiate or settle cases without litigation, by using alternative dispute resolution techniques that have proven efficacious elsewhere, but SSA really has little to negotiate with or compromise over. The disability program ought not to be in the practice of paying benefits to a claimant simply because he or she would be an evocative litigant in a court, if lawful eligibility criteria are not met.

On balance, we have no clearly better alternative strategy to propose, and we note that participation in the supplementary review function carries the virtue of providing the Appeals Council with a valuable window on the world of federal litigation, complementing its perspective on the administrative processing of claims.

ii. Court remands. For similar reasons, we basically endorse the current operation of the Appeals Council in court remand situations.[399] Although some internal adjustments should be made (e.g., less reliance upon "fast track" remands, and more careful articulation of guidance to the ALJ), we think that the Appeals Council can serve as a useful intermediary in cases coming down from the courts, even if it did not see that particular case on the way up.

iii. Appeals. The Appeals Council ought to be more involved in advanced court litigation strategy, as well.[400] This is a complicated and frustrating area of practice -- lawyers from HHS and Justice frequently disagree over whether appeals are tactically wise, legally justified, or of sufficiently high priority. These differences will continue, no doubt, but the Appeals Council should have a voice in discussing them. The Appeals Council can contribute a special bureaucratic perspective in appellate planning -- not the only such perspective, but a valid one that should not be ignored.[401]

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[399] See supra text accompanying note 307.

[400] See supra text following note 309.

[401] SSA officials acknowledge that litigation strategy decisions are complex, and that the current process for making them is sometimes tumultous. See Bradley, supra note 298, ("I'm interested in litigation management. I think SSA, and OHA, is getting beaten over the head unnecessarily, that we are losing cases we should be winning and that we are appealing cases we shouldn't even appeal or touch and we need to have an SSA strategy with OHA making a significant contribution

(Footnote continued)

More generally, the Appeals Council should improve its ability to monitor disability cases as they proceed through court. Members should track the cases they work on, studying courts' reactions and attempting to extract lessons of future applicability.

It is worth inserting here the hope that the federal courts will let SSA improve under Model 4. SSA's recent performance and track record in the federal courts have been abysmal, and the agency's reputation has fallen so low that little deference can be expected. Perhaps this disrepute has recently bottomed out, and perhaps the worst incidents (the initial wave of CDRs, targetted Bellmon review) that triggered the animosity are largely behind us. But there is a danger that the federal courts will be reluctant to retreat again to the customary standard of "substantial evidence" review. The courts see only a skewed sampling -- only denials where there is a good argument that the claimant has been wronged -- and it is natural that federal judges would continue to see themselves as the champions of the disenfranchised, without recognizing that the SSA pays administratively 99.6% of the awards without judicial intervention.

As SSA's performance improves -- assisted, we hope, by a reconfigured Appeals Council -- its success rate in court should begin to improve, too. We hope that the lag between the two changes will not be too great -- that courts will acknowledge, and give credence to, systematic improvements in the disability adjudication process. But we are not sanguine that ponderous bureaucracies, such as the Social Security Administration and the federal judiciary, will react with either grace or speed. Our recommendations, therefore, are not a short term panacea, but a formula for longer term accomodation, and subsequent monitoring will be required.

f. Enhance Support Systems. To support the improvements called for in Model 4, the Appeals Council will require a variety of types of asistance.

i. Reorganize OAO. We imagine a somewhat smaller operation in OAO, as fewer analysts will be needed to handle the smaller caseload. (Partially offsetting this reduction in volume

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401(continued)
to that whole judicial process. That is also the Commissioner's priority, at least in terms of the SSA part of it. I would like to see us improve our relationships with the court so that they have a better understanding about what SSA law is about.")

of cases, however, will be the need to work the remaining cases with greater intensity.) Certainly OAO should be reorganized to team a defined group of analysts and support personnel with each small panel of members. These units should become more coherent and mutually supportive than is permitted by the overlapping responsibilities of today's structure.

The possibility also exists of merging OAO and the Appeals Council into a single bureaucratic unit, although this is a closer question under Model 4. Since members' functions would be tied primarily to systematic reform, instead of to work on the cases, there might emerge a greater functional distinction between roles of members and the roles of analysts than there has previously been. This might suggest less need to integrate the two groups. On the other hand, it does seem preferable to organize these work units tightly, and OAO in the future could focus its attention on recruiting analysts who were not only good at reading the claims files, but who were also adept at assisting the members in performing their other functions, too. On balance, therefore, we also recommend merging OAO into the Appeals Council.

ii. Law clerks. Members of the Appeals Council should also have personal law clerks, a modest expense for the bureaucracy, and a significant asset in organizing the work. The savings in efficiency, in enhanced productivity for the members' performance of their primary obligations, should be substantial.

iii. Computer support. The data processing and word processing capabilities of the Appeals Council are in need of major improvement. The current hardware is minimal and already obsolescent. The software is far beneath the standard of the industry, and the Appeals Council is not yet able to attempt many of the manipulations it ought to be able to perform with ease. The staff support is virtually non-existent; indeed, even the current level of performance would not be available, but for the ingenuity of a single self-educating staff member.

The first order of business must be modern word processing capability. The needs of the Appeals Council are not so sophisticated, and its demands are not so heavy that the highest technology system is required; but a solid and adequately-proliferated network would be a major asset. We do not have the expertise to recommend a specific system, but it seems clear that each member should have a word processing capacity -- the savings in delays for minor corrections alone would be substantial, and would be even greater if the analysts, too, were brought into the modern world.

Data processing, too, is a crying need. The Appeals Council now is barely able to track its files, and the system is not considered sufficiently reliable to dispense with old manually-maintained index cards as a backup system. The statistical base of Appeals Council operations is important -- and it would become far more so under Model 4, as the Appeals Council attempts to extract useful policy generalizations out of the flow of individual adjudications. At present, the data processing capability of the Appeals Council is in its infancy, and abrupt upgrading is required.

All Appeals Council and ALJ decisions are now produced via a word processor, but the memory of each decision is ordinarily erased as soon as it is issued, in order to save storage capacity. We recommend that this deletion practice be halted immediately, and that the full text of all OHA adjudications be retained indefinitely, for a variety of purposes. The Appeals Council may use these closed cases as part of its research on "error prone" or otherwise problematic cases; claimants' representatives might use them (with identifying details removed) to assist them in researching precedential cases; and other uses may appear with current or future data search techniques.

More generally, we recommend that the Appeals Council, or OHA on behalf of the ALJs as well, seek the advice of qualified systems engineers who specialize in the storage and retrieval of this type of material. Consulting experts of this sort are frequently relied upon by private industry and law firms, and SSA, too, could benefit from their ability to evaluate the institution's needs and match it with the available technology.

iv. Office space. Finally in the category of "support," we recommend changes in the members' office arrangements. OHA is now scattered over five buildings in Arlington, Virginia, and we think it ought to be consolidated in one location, preferably within the SSA headquarters complex in Baltimore. The principle of using physical remoteness to underscore the judicial independence of the members is, we think, a valid one, but it bends before the greater value of having the Appeals Council sit nearer the policymakers it is intended to assist. Under Model 4, the Appeals Council, and the whole of OHA, should become more of a player in the policy process, and that requires a headquarters location.

g. Enhance the Appeals Council's Visibility. Mashaw wrote of the Social Security claims procedure in general that, "The internal workings of the process that might inspire confidence...are invisible."[402] Nowhere is this more true than for the Appeals Council. Precious little is known about the nature and operation of the organization, and its members and their activities are largely shrouded from view.

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[402] Mashaw, supra note 1, at 143.

In part, this invisibility may spring from a degree of defensiveness about the institution -- reluctance to advertise the true facts about the low reversal rates and the high volume of cases per member per day. But the invisibility has incited a substantial cost in terms of public acceptability, and we recommend that it be reversed.

In particular, we recommend that the Appeals Council publicize itself, and conduct outreach activities designed to enhance the public's and, in particular, the claimants' bar's, knowledge about its work. Claimants and their representatives have a lot to say about the operation of the disability adjudication system, and the Appeals Council can be one point of contact. We do not expect this greater interaction to result in easy conformity of views or harmony of interests, but we do think that the worst aspects of an image of arbitrariness and futility can be cast aside. And, of course, it should become easier for claimants or their representatives to contact the Appeals Council, to learn the status and scheduling of a particular case.[403]

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[403] The current SSA mechanism, which a claimant is supposed to follow in order to inquire about the status of his or her case pending before the Appeals Council, is one of Rube Goldberg complexity:

> "For example, if a claimant were to inquire regarding the status of an appeal, he would normally direct his questions through the local district office (DO). The DO employee would initially obtain an HA04 query from the OHA Case Control System (CCS) and call OHA's Congressional and Public Inquiries Staff (CPIS).
>
> "The CPIS employee would record the message and obtain another HA04 query to identify which OAO branch was acting on the claimant's request for review. The CPIS employee would contact the appropriate branch control section. The OAO "contact" would then record the request and institute a manual search of the branch to determine which analyst had been assigned the case. The OAO contact would then obtain the last known status of the case and inform CPIS.
>
> "The CPIS employee would record the response and reply to the DO employee for further communication to the claimant. This practice has not only been time consuming, but it also demands involvement of many more personnel than are necessary." OMAPI Report, supra note 217, at 26.

We think that Appeals Council members should make more public apearances, participate in bar activities more, and write about their work, in the interests of enhancing public acceptability of their activities. They should meet with federal judges, too, to discuss disability matters in general and case-handling in particular.

Inside the SSA, the members of the Appeals Council should endeavor to build bridges to the ALJs and to other parts of the organization. We liked the "visiting ALJ" program and think it should be reinstated -- at least one, and maybe more, seats on the Appeals Council should be reserved for ALJs who accept a temporary assignment with the Appeals Council, to test whether they would like to apply for membership, to infuse new perspectives into the Appeals Council, and to enhance the corps' appreciation for the work of their reviewers.

Conversely, we think that there ought to be traffic in the opposite direction, too. That is, Appeals Council members ought to take occasional temporary duty assignments as ALJs, conducting hearings in the field, to learn from that perspective, too. Even those members who have "graduated" from the ALJ corps could benefit from an occasional refresher.

Similar interfaces, and perhaps similar exchange programs, ought to be instituted with the other components of SSA -- the district offices, the state disability determination services, etc. Since Model 4 gives the Appeals Council responsibility for participating in the process of enhancing the operations of the entire disability adjudication network, it ought to have more regular and meaningful contact with the lowest tiers, too. In this way, the Appeals Council may be able to get some sort of handle on the operations of the behemoth that the disability program has become, and help derive top-to-bottom improvements in it.

Most importantly, the Appeals Council will require greater visibility within the higher echelons of SSA. For too long, the Appeals Council has been too isolated; it must now re-emerge as a key player, with direct action channels to the leadership. The "policy development" role can succeed only if the policymakers want it to -- they must be willing to accept the Appeals Council members as participants, and must consciously alter existing routines in order to admit a new set of perspectives.

V. Conclusion.

Having considered the available models for future Appeals Council operations, we conclude: 1) that the status quo is too deeply flawed to be sustained -- the present structure is not doing the job to anyone's satisfaction; 2) that the Appeals Council should not be abolished -- at least not yet, before one more effort at serious reform; 3) that a "case correction" role could be carved out to let the Appeals Council perform this function more successfully -- but this role would still prove unsatisfactory, pursuing a chimera of accuracy and wasting the Appeals Council's real comparative advantage; and 4) that the role of systems reformer -- suggesting new policies, developing new practices, and implementing new experiments -- is the most valuable mandate for the Appeals Council, enabling it to put its case-handling experience to the best use, and empowering it to aid SSA in the most needed fashion.

The systems reform mode of the Appeals Council, and the several specific implementation steps we have outlined, are not easy or inexpensive. Nor is there any guaranty of success. Effectuation will require the conscious action of the SSA leadership, including the personal attention of the Commissioner.

But we are confident that the proposal is feasible, and we are convinced that it would be highly advantageous. The Appeals Council stands now as both over- and under-utilized. It is buried in case files, but its acquired expertise is never marshalled or implemented. Our study of the Appeals Council has made us appreciate its potential, and despair of its wasteage. The Social Security Administration, and its claimants, can and should do better.

Chart 1

SSA's Sequential Evaluation Process for Assessing Disability

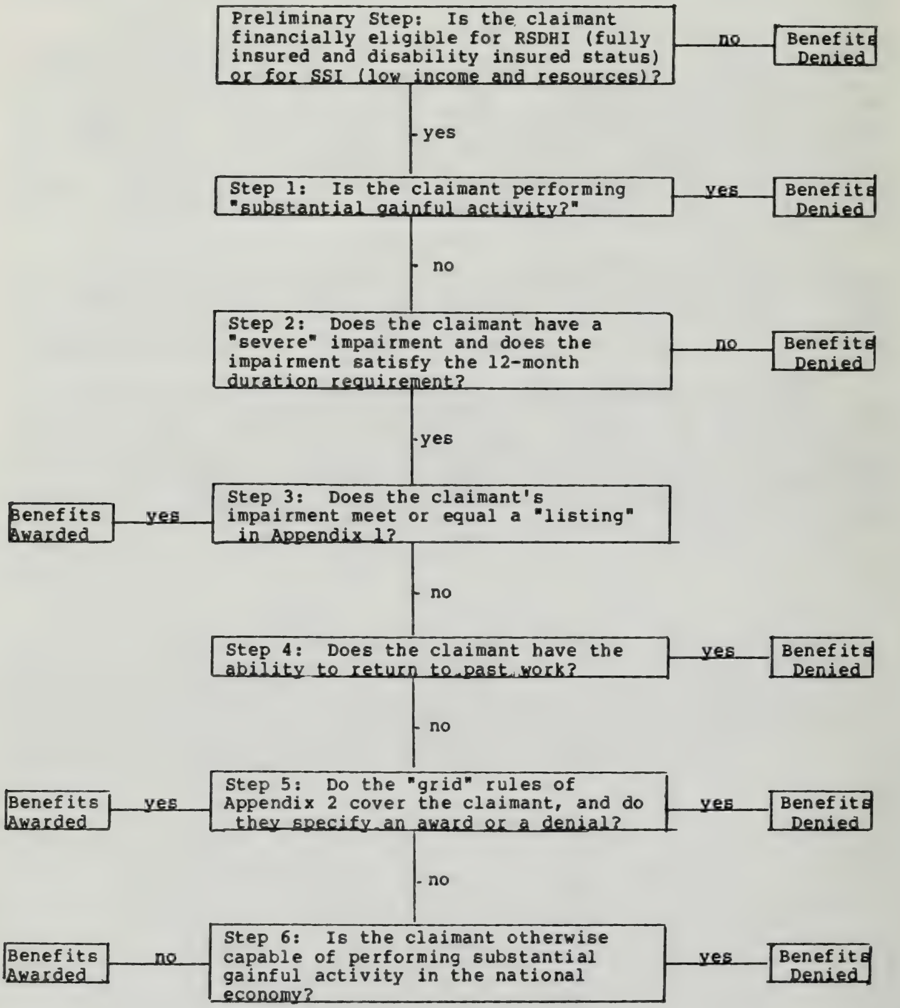
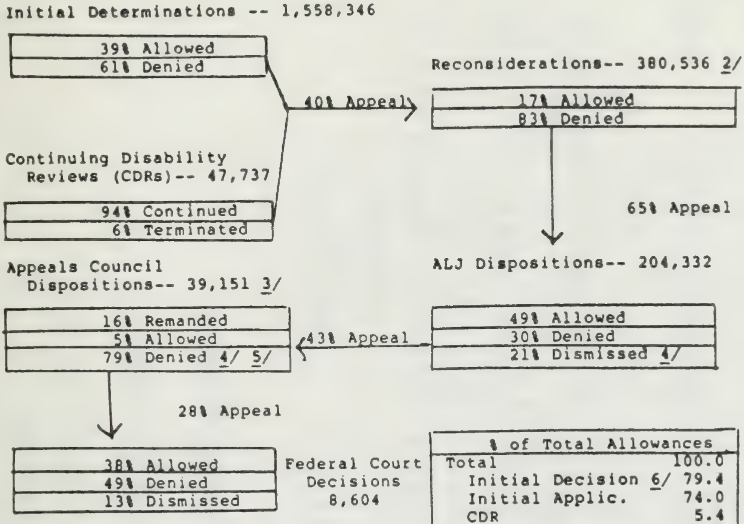

Preliminary Step: Is the claimant financially eligible for RSDHI (fully insured and disability insured status) or for SSI (low income and resources)?
no
Benefits Denied
yes
Step 1: Is the claimant performing "substantial gainful activity?"
yes
Benefits Denied
no
Step 2: Does the claimant have a "severe" impairment and does the impairment satisfy the 12-month duration requirement?
no
Benefits Denied
yes
Benefits Awarded
yes
Step 3: Does the claimant's impairment meet or equal a "listing" in Appendix 1?
no
Step 4: Does the claimant have the ability to return to past work?
yes
Benefits Denied
no
Benefits Awarded
yes
Step 5: Do the "grid" rules of Appendix 2 cover the claimant, and do they specify an award or a denial?
yes
Benefits Denied
no
Benefits Awarded
no
Step 6: Is the claimant otherwise capable of performing substantial gainful activity in the national economy?
yes
Benefits Denied

Chart 2

TABLE 4.—DISABILITY DETERMINATIONS AND APPEALS, FISCAL YEAR 1986

Title II, Title XVI and Concurrent Title II and XVI Decisions
For Disability Claims by Workers, Widows, Widowers and
Disabled Adult Children 1/


Initial Determinations -- 1,558,346
39% Allowed
61% Denied
Reconsiderations-- 380,536 2/
40% Appeal
17% Allowed
83% Denied
Continuing Disability Reviews (CDRs)-- 47,737
94% Continued
6% Terminated
65% Appeal
Appeals Council Dispositions-- 39,151 3/
ALJ Dispositions-- 204,332
16% Remanded
5% Allowed
79% Denied 4/ 5/
43% Appeal
49% Allowed
30% Denied
21% Dismissed 4/
28% Appeal
38% Allowed
49% Denied
13% Dismissed
Federal Court Decisions 8,604

% of Total Allowances	
Total	100.0
Initial Decision 6/	79.4
Initial Applic.	74.0
CDR	5.4
Reconsiderations	7.8
ALJs	12.1
Appeals Council	0.2
Federal Court	0.4

1/ The data relate to workloads processed at the various levels in FY 86, but include some cases where the initial level decision was made in a prior period. The data include determinations on initial applications as well as continuing disability reviews (both periodic reviews and medical diary cases).

2/ Title II only. Title XVI and concurrent Title II/XVI cessation cases go directly to an ALJ hearing.

3/ Includes ALJ decisions cases not appealed further by the claimant but reviewed by the Appeals Council on its "own-motion" authority.

4/ Includes periodic review cases in which benefits were reinstated under Secretary Heckler's suspension of the continuing disability review process in April 1984.

5/ Includes dismissals, denials of request for review, and affirmations of denial.

6/ Initial determinations plus CDRs.

SOURCE: "Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means," WMCP: 100-4, Committee on Ways and Means, U.S. House of Representatives, March 6, 1987.

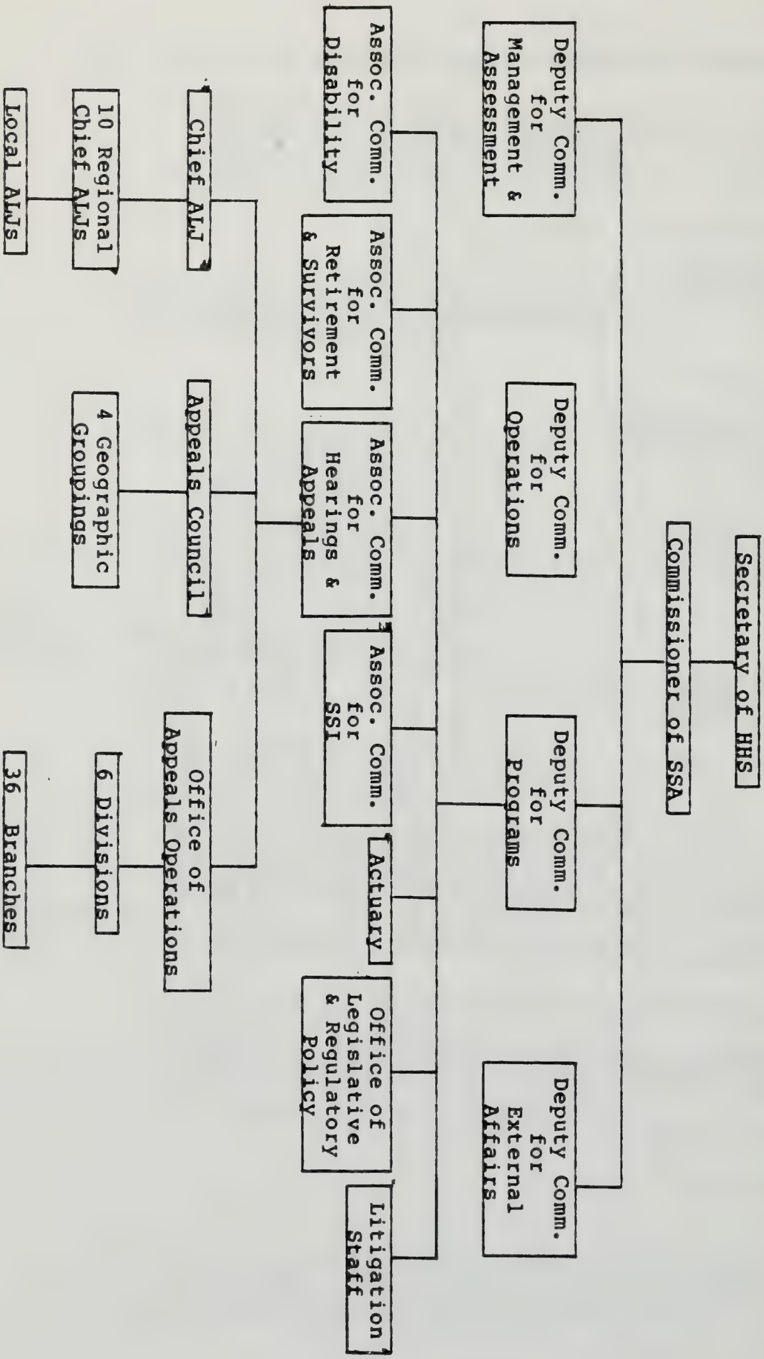

Secretary of HHS
Commissioner of SSA
Deputy Comm. for Management & Assessment
Deputy Comm. for Operations
Deputy Comm. for Programs
Deputy Comm. for External Affairs
Assoc. Comm. for Disability
Assoc. Comm. for Retirement & Survivors
Assoc. Comm. for Hearings & Appeals
Assoc. Comm. for SSI
Actuary
Office of Legislative & Regulatory Policy
Litigation Staff
Chief ALJ
10 Regional Chief ALJs
Local ALJs
Appeals Council
4 Geographic Groupings
Office of Appeals Operations
6 Divisions
36 Branches

Chart 3

Partial SSA Organization Chart

Chart 4

Geographic Groupings of Appeals Council Members

		SSN Terminal Digit Case Nos.
Group I 1, 2, 11 Circuits	John W. Chambers	000-249
	William Raffel	250-499
	William C. Taylor	500-749
	John Wojciechowski	750-999
Group II 3, 4, 7 Circuits	Larry K. Banks	000-199
	Verrell D. Dethloff, Jr.	200-399
	Adelaide E. Edelson	400-599
	Constance T. O'Bryant	600-799
	Lawrence Weiner	800-999
Group III 5, 8, 9, DC Circuits	Marilyn W. Carney	000-165
	Felix V. DeJesus	166-331
	Samuel H. Depew	332-498
	Harriet A. Simon	499-665
	Margaret W. Tryon	666-832
	Roland L. Vaughn, Jr.	833-999
Group IV 6, 10 Circuits	David G. Danziger	000-249
	Jeanette E. Perry	250-499
	Manny H. Smith	500-749
	Andrew E. Wakshul	750-999

Chart 5

Source: SSA OHA Key Workload Indicators, July, 1987

NATIONAL SUMMARY - HEARINGS

									AVERAGE PROCESSING TIME					
FISCAL YEAR	ADJUSTED RECEIPTS		DISPOSITIONS		PENDING (END OF)	AVG. NO. ALJS ON DUTY 1/	AVG.SUP. STAFF RATIO 2/	AVG. DISP. PER ALJ3/	FILED TO HEAR. HELD	HEAR. HELD TO DISP.	HEAR. FILED TO DISP.4/	AVG. NO. OF CASES PENDING PER ALJ 3/	AVG. AGE OF PENDING CASES 5/	DAYS WORTH OF REC. PEND. 6/
FY 73	72,202		68,356		36,780	420	2.2	14			174	117	N.A.	184
FY 74	121,504		80,783		77,233	478	2.7	13			164	122	N.A.	224
FY 75	154,962		121,026		111,169	591	2.9	16			262	173	219	260
FY 76	157,688		179,088		89,769	647	3.6	21			288	153	285	203
FY 76 T.Q. 7/	45,418		50,271		84,916	637	3.6	21			233	137	236	187
FY 77	193,657		186,822		91,751 8/	629	3.8	25			215	136	185	163
FY 78	196,428		215,445		74,747	657	3.9	27			179	128	133	134
FY 79	226,240		210,775		90,212	655	4.3	27			151	141	104	138
FY 80	252,023		232,599		109,636	669	4.4	30			159	169	109	152
FY 81	281,737		262,609		128,764	699	4.4	32			164	188	119	163
FY 82	320,680		296,548		152,896	754	4.7	34	121	65	174	203	124	160
FY 83	363,533		342,998		173,431	797	4.6	37	121	77	184	228	124	167
FY 84 9/	271,809		337,459		107,781	763	4.7	37	121	77	185	144	126	157
FY 85 9/	245,090		245,829		107,042	730	4.5	29	108	69	167	154	113	154
FY 86	230,655		220,313		117,384	703	4.6	27	115	74	172	173	109	161
FY 87														
	NO.	CUM.	NO.	CUM.										
October	22,575	22,575	17,561	17,561	122,398	686	4.5	26	115	71	176	181	111	165
November	19,904	42,479	15,492	33,053	126,810	685	4.6	23	116	72	178	187	116	172
December	21,388	63,867	17,557	50,610	130,641	684	4.6	26	116	75	181	193	121	179
1st Qtr.	68,273	68,273	52,415	52,415	133,242	685	4.6	26	116	75	179	197	121	177
January	18,400	86,673	17,072	69,487	134,570	675	4.6	26	120	83	194	202	126	184
February	22,695	109,368	17,075	86,562	140,190	672	4.5	26	124	83	195	213	127	190
March	26,550	135,918	20,891	107,453	145,849	668	4.6	32	130	82	199	222	126	194
2nd Qtr.	72,019	140,292	57,314	109,729	147,947	672	4.6	29	125	85	197	226	126	192
April	21,158	161,450	20,676	130,405	148,429	663	4.6	32	132	82	201	226	129	195
May	19,244	180,694	19,027	149,432	148,646	661	4.7	29	136	78	202	228	136	201
June	26,252	206,946	23,643	173,075	151,255	660	4.7	37	139	79	206	234	133	198
3rd Qtr.	70,798	211,090	65,549	175,278	153,196	661	4.7	34	136	N.A.	N.A.	237	133	195
July	20,527	231,617	22,846	198,124	150,877	652	4.8	36	140	79	207	235	136	192

1/ FY 73 - 86 includes RCALJs. Beginning FY 87 excludes RCALJs.

2/ Permanent Staff FY 73 - FY 78; FY 79 - FY 82 includes ORCALJ and temporary positions; beginning FY 83 includes only hearing office full-time permanent staff excluding interpreters.

3/ FY 73 - FY 82 includes RCALJs. FY 83 - FY 86 ALJ average dispositions are calculated using one-fourth of a work month for each RCALJ, adjustments for ALJs on leave, and the learning curve for new ALJs. Beginning FY 87 the RCALJs are excluded from the calculations.

4/ Median Times for FY 73 - FY 74; beginning FY 75 mean times - SSI cases not included until FY 76 transition quarter.

5/ SSI cases not included until FY 76 transition quarter. Fiscal year figures are based on cases pending at the end of the year. Monthly figures are based on cases pending at the end of the month.

6/ Fiscal year figures are based on cases pending at the end of the year. Monthly figures are based on cases pending at the end of the month.

7/ T.Q. = transition quarter which covers period June 20, 1976 - October 2, 1976.

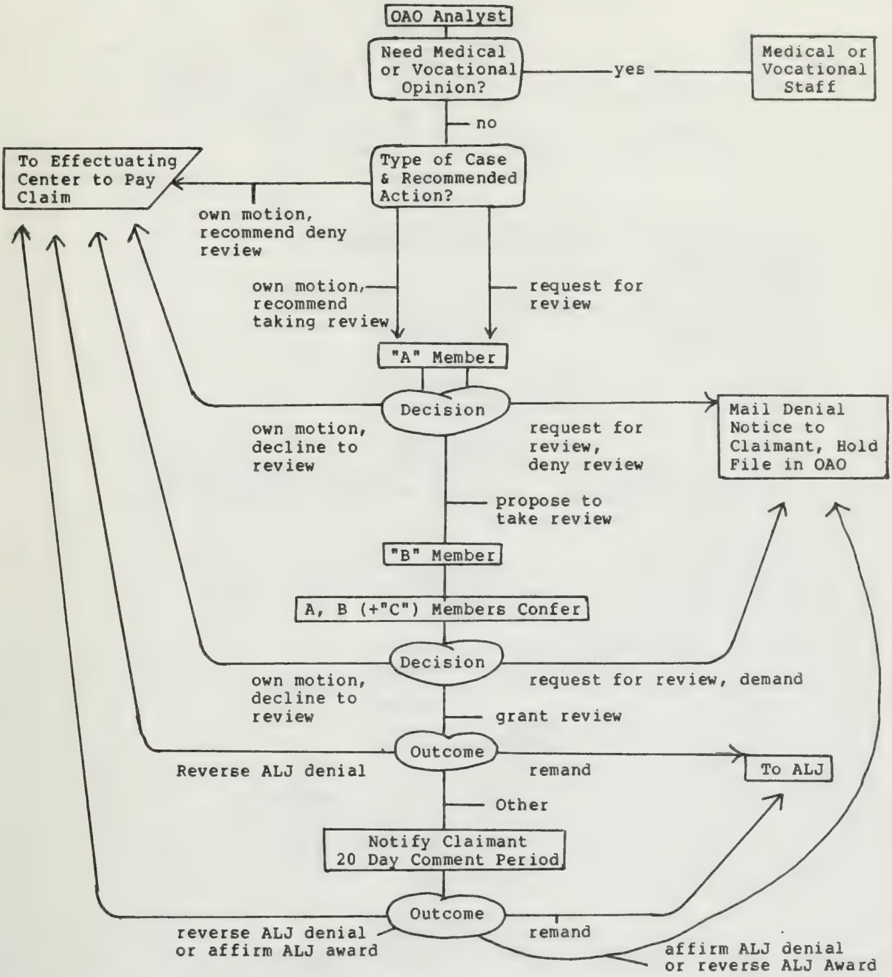
8/ Adjusted up 2,013 cases from FY 77 due to conversion from a manual to an automated reporting system.

9/ Some statistics were affected by the Secretary's moratorium on the processing of continuing disability reviews, various class action court orders and implementation of the 1984 Disability Benefits Reform Act.

NOTE: This data includes pending and processing times for sanction cases which began in 1983.

Source: Average number of ALJs on duty and average support staff ratio from Staffing Report, Office of Financial Resources.

Chart 6A - OHA Workflow -- Review Level


OAO Analyst
Need Medical or Vocational Opinion?
yes
Medical or Vocational Staff
no
Type of Case & Recommended Action?
To Effectuating Center to Pay Claim
own motion, recommend deny review
own motion, recommend taking review
request for review
"A" Member
Decision
Mail Denial Notice to Claimant, Hold File in OAO
own motion, decline to review
request for review, deny review
propose to take review
"B" Member
A, B (+"C") Members Confer
Decision
own motion, decline to review
request for review, demand
grant review
Outcome
Reverse ALJ denial
remand
To ALJ
Other
Notify Claimant 20 Day Comment Period
Outcome
reverse ALJ denial or affirm ALJ award
remand
affirm ALJ denial or reverse ALJ Award

File may be returned to OAO at any stage for further workup or rewriting decisional documents.

Chart 6B - OHA Workflow -- New Court Cases

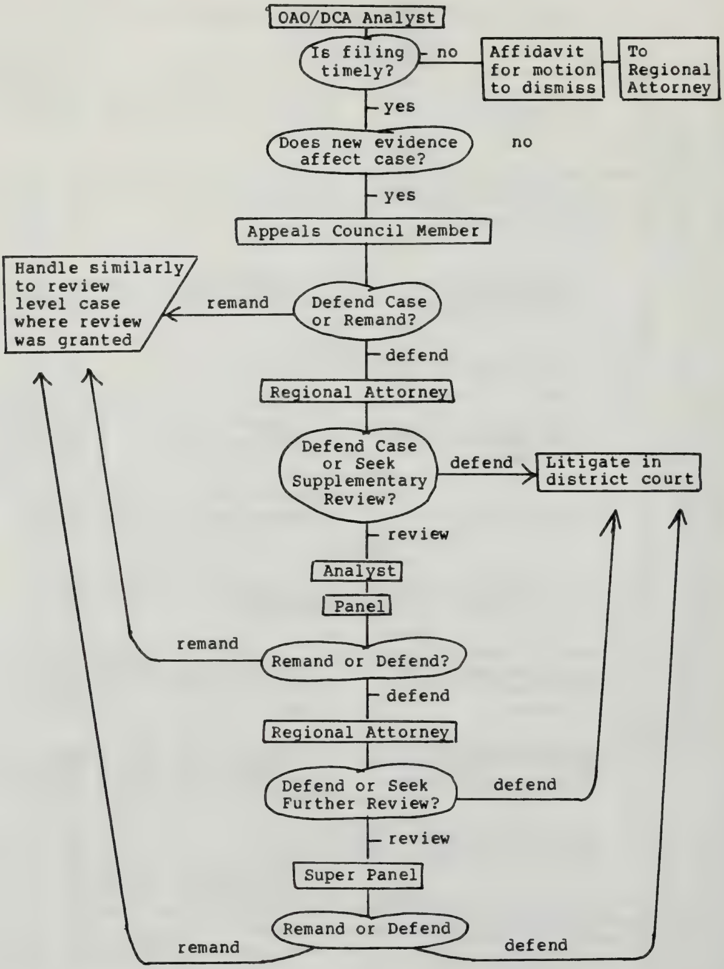

OAO/DCA Analyst
Is filing timely?
no
Affidavit for motion to dismiss
To Regional Attorney
yes
Does new evidence affect case?
no
yes
Appeals Council Member
Handle similarly to review level case where review was granted
remand
Defend Case or Remand?
defend
Regional Attorney
Defend Case or Seek Supplementary Review?
defend
Litigate in district court
review
Analyst
Panel
remand
Remand or Defend?
defend
Regional Attorney
Defend or Seek Further Review?
defend
review
Super Panel
Remand or Defend
remand
defend

Chart 6C - OHA Workflow -- Court Remands

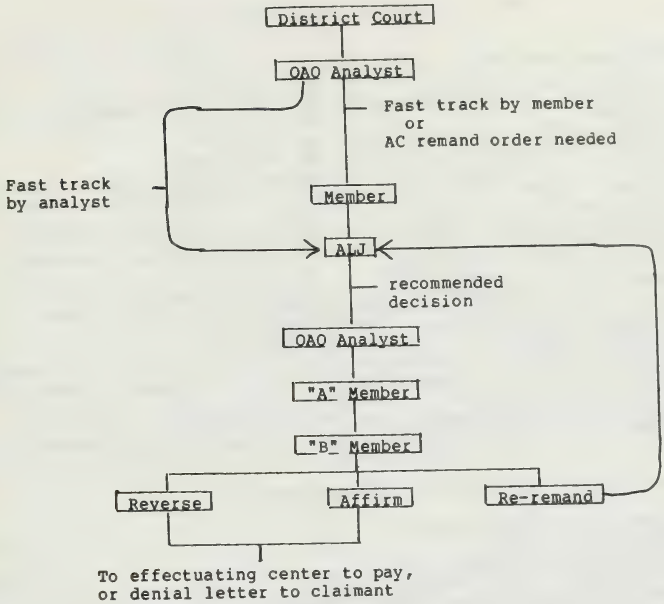

District Court
OAO Analyst
Fast track by member
or
AC remand order needed
Fast track
by analyst
Member
ALJ
recommended
decision
OAO Analyst
"A" Member
"B" Member
Reverse
Affirm
Re-remand
To effectuating center to pay,
or denial letter to claimant

Chart 7

List of Sources Interviewed

1. SSA Officials and Former Officials

Eileen Bradley, Associate Commissioner for Hearings and Appeals
Hal Bryson, Office of Disability Operations
Louis Enoff, Deputy Commissioner for Programs
Donald Gonya, Associate General Counsel of HHS and SSA Chief Counsel; former Acting Associate Commissioner for Hearings and Appeals
Louis Hays, Associate Administrator for Operations, HCFA; former Associate Commissioner for Hearings and Appeals
Sid Leibovitz, SSA Historian
Joe Mieczkowski, District Manager, Washington, D.C.
Patricia M. Owens, Vice President, Paul Revere Insurance Group; former Associate Commissioner for Disability
Harvey Schein, Office of Disability Operations
Dan Skoler, Director, Education and Training Division, Federal Judicial Center; former Deputy Associate Commissioner for Hearings and Appeals
Frank Smith, Chief Counsel, Family Support Administration; former Associate Commissioner for Hearings and Appeals

2. Appeals Council Members and Former Members

Burton Berkley, Deputy Chair
John Chambers, Member
Adelaide Edelson, Member
Herman Elegant, former Member
Irwin Friedenberg, former Deputy Chair
Constance O'Bryant, Member
Harriet Simon, Member
William Taylor, Member
Margaret Tryon, Member
Roland Vaughn, Member
Andrew Wakshul, Member

3. OAO Officials

Ora Brown, Branch Chief
Gary Gilliam, Analyst
Carolyn Goodwin, Analyst
William LaVere, Deputy Director
Edwin Semans, Director
Sue Wiley, Analyst

4. Administrative Law Judges

*Harry Farbman, Miami, FL
*Mark Haase, Columbus, OH
*Paul Harkey, Dallas, TX
William Lissner, Richmond, VA
*Paul Rosenthal, Santa Ana, CA; former National Chief ALJ
Jim Rucker, National Chief ALJ, Washington, DC
Sanford Serber, Washington, DC

5. Claimants' Representatives and Spokespersons

Bruce Billman, private practice, Woodbridge, VA
Nancy Coleman, ABA Commission on the Elderly, Washington, DC
Joan Fairbanks, ABA Commission on the Elderly, Washington, DC
*Lyle Lieberman, private practice, Miami, FL
*Steven Owen, private practice, Washington, DC
*Rudolph Patterson, private practice, Macon, GA
Michael Schuster, Legal Counsel for the Elderly, Washington, DC
*Marvin Schwartz, Social Security Disability Foundation, New York; former ALJ
Nancy Shor, National Organization of Social Security Claimants Representatives, New York
Eileen Sweeney, National Senior Citizens Law Center, Washington, DC
*Carl Weisbrod, private practice, Dallas, TX
*Sally Hart Wilson, National Senior Citizens Law Center, Los Angeles, CA

6. Congressional Sources

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Pat Dilley, Staff Director, Social Security Subcommittee, Ways and Means Committee
Joe Humphrys, Senate Finance Committee Staff
Margaret Malone, Senate Finance Committee Staff
Carolyn Weaver, American Enterprise Institute, former Senate Finance Committee Staff
Karen Worth, Senate Finance Committee Staff

7. Court Personnel

*Robert Carr, U.S. Magistrate, Charleston, SC
*Dale Cook, Chief Judge, U.S. District Court for the Northern District of Oklahoma; former Director of Bureau of Hearings and Appeals

8. Academia

*Frank Bloch, Professor of Law, Vanderbilt University
*Jerry Mashaw, Professor of Law, Yale University

*Interviewed via telephone

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